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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

COUNTY OF BERKS, PENNSYLVANIA, *et al.*,
Petitioners,

v.

MERRY J. MURTAGH, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania, Middle District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Supremacy Clause require a state court to entertain an action brought under 42 U.S.C. § 1983 challenging the constitutionality of a local government's administration of its system of property taxation where plaintiffs have not exhausted the plain, adequate and complete administrative and judicial remedies available to them under state law?

PARTIES TO THE PROCEEDING

The petitioners in this Court, all of whom were parties to the proceeding in the Supreme Court of Pennsylvania, are: County of Berks, Pennsylvania; Berks County Board of Assessment Appeals; Boyertown Area School District; Daniel Boone Area School District; Exeter Township School District; Fleetwood Area School District; Governor Mifflin School District; Kutztown Area School District; Muhlenberg School District; City of Reading School District; Schuylkill Valley School District; Wilson School District; Wyomissing Area School District; Hamburg School District; Twin Valley School District; Borough of Wyomissing Hills; Borough of Birdsboro; Borough of Mohnton; Borough of Mt. Penn; Borough of Robesonia; Borough of Sinking Spring; Borough of West Reading; Borough of Womelsdorf; Township of Amity; Township of District; Township of Earl; Township of Heidelberg; Township of Jefferson; Township of Lower Heidelberg; Township of Maidencreek; Township of Oley; Township of Ontelaunee; Township of Penn; Township of Pike; Township of Richmond; Township of South Heidelberg; Township of Tilden; Township of Upper Tulpehocken; Township of Douglass; Greenwich Township; Marion Township; Brecknock Township; Centre Township; Maxatawny Township; Caernarvon Township; Borough of Kutztown; Borough of St. Lawrence; Borough of West Lawn; Borough of Hamburg; Borough of Laureldale; Oley Valley School District; Borough of Centerport; Borough of Bally; Robeson Township; Spring Township; Upper Bern Township; Borough of Bechtelsville; Borough of Kenhorst; Leesport Borough; Colebrookdale Township; Cumru Township; Muhlenberg Township; and Conrad Weiser School District.

The respondents in this Court, all of whom were parties to the proceeding in the Supreme Court of Pennsylvania, are: Merry J. Murtagh; Spencer Lee Cherashore; Frederick Murtagh; Mary S. Murtagh; Anthony

Gigliotti; George Chovanes; Margaret Chovanes; Michael Chovanes; LRM Ziegenfuss, a Pennsylvania partnership; and Concetta C. Good, on behalf of themselves and all owners of real property situated in Berks County, Pennsylvania who purchased their property since January 1, 1980.

The following parties, all of whom were parties to the proceeding in the Supreme Court of Pennsylvania, are also respondents in this Court, although petitioners believe that these respondents support the position of petitioners: Borough of Topton; Lower Alsace Township; City of Reading; Borough of Boyertown; Borough of Fleetwood; Borough of Lenhartsville; Borough of Lyons; Borough of Shillington; Borough of Shoemakersville; Borough of Strausstown; Borough of Temple; Borough of Wernersville; Borough of Wyomissing; Albany Township; Alsace Township; Bern Township; Bethel Township; Exeter Township; Hereford Township; Longswamp Township; North Heidelberg Township; Perry Township; Rockland Township; Ruscombmanor Township; Union Township; Washington Township; Windsor Township; Antietam School District; Brandywine Heights Area School District; Tulpehocken Area School District; and Upper Perkiomen Valley School District.

Petitioners have no parent companies or subsidiaries to list pursuant to Rule 29.1.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 13

I. State Courts Of Last Resort Are In Conflict With Respect To The Question Presented ... 15

II. This Petition Presents An Important Question Of Federal Law That Has Not Been, But Should Be, Resolved By This Court 22

CONCLUSION 27

APPENDIX

Opinion of the Supreme Court of Pennsylvania, Middle District, in *Murtagh v. County of Berks*, decided November 10, 1993 ..... 1a

Opinion of the Commonwealth Court of Pennsylvania in *Greenwich Township v. Murtagh*, filed January 9, 1992 ..... 19a

Order of the Court of Common Pleas of Berks County, Pennsylvania, dated December 3, 1990 ..... 35a

Brief of Appellants Merry J. Murtagh, *et al.*, filed in the Supreme Court of Pennsylvania 38a

TABLE OF CONTENTS – *(Continued)*

Page

Brief for Appellees County of Berks, *et al.*, filed in the Supreme Court of Pennsylvania.....58a

Brief for Appellants Borough of Wyomissing Hills, *et al.*, filed in the Commonwealth Court of Pennsylvania 93a

Preliminary Objections of Defendants Daniel Boone Area School District, *et al.*, filed in the Court of Common Pleas of Berks County, Pennsylvania 127a

Plaintiffs' Amended Complaint 132a

TABLE OF AUTHORITIES

Cases: Page

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 14, 23

Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976) 21

Behe v. Chester County Bd. of Assessment Appeals, 952 F.2d 66 (3d Cir. 1991)..... 11

Bung's Bar & Grille, Inc. v. Township Council, 206 N.J. Super. 432, 502 A.2d 1198 (Law Div. 1985) 21

Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988)..... 21

Dean v. State, 250 Kan. 417, 826 P.2d 1372, *cert. denied*, 112 S. Ct. 2941 (1992) 18

Dennis v. Higgins, 498 U.S. 439 (1991)..... 14, 16, 25, 26

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 6, 7, 22, 23

Felder v. Casey, 487 U.S. 131 (1988) 17

Garrett v. Bamford, 582 F.2d 810 (3d Cir. 1978).. 11

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943)..... 22

Greenwich Township v. Murtagh, 144 Pa. Commw. 624, 601 A.2d 1352 (1992)..... 2, 6-9

Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Revenue, 583 N.E.2d 214 (Ind. Tax Ct. 1991) 21

Hogan v. Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), *cert. denied*, 112 S. Ct. 867 (1992)..... 19, 20

Howlett v. Rose, 496 U.S. 356 (1990)..... 17

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Johnson v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *review denied*, 313 N.C. 508, 329 S.E.2d 392 (1985) 21

L.L. Bean, Inc. v. Bracey, 817 S.W.2d 292 (Tenn. 1991) 18, 19

Linderkamp v. Bismarck Sch. Dist. No. 1, 397 N.W.2d 76 (N.D. 1986) 17, 18

McManus v. State of Iowa, Dep't of Revenue & Fin., 499 N.W.2d 726 (Iowa), *cert. denied*, 114 S. Ct. 580 (1993) 20

Murtagh v. County of Berks, 634 A.2d 179 (Pa. 1993)..... 1, 9-13, 16, 18, 20, 21, 24

Murtagh v. Greenwich Township, 530 Pa. 635, 606 A.2d 904 (1992)..... 9

Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 112 S. Ct. 867 (1992).... 20

Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) 16

Raschke v. Blancher, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986) 21

Spencer v. South Carolina Tax Comm'n, 471 U.S. 82 (1985) (per curiam) 14, 21, 25

Spencer v. South Carolina Tax Comm'n, 281 S.C. 492, 316 S.E.2d 386 (1984)..... 14, 21, 25

State v. Quill Corp., 500 N.W.2d 196 (N.D.), *cert. denied*, 114 S. Ct. 173 (1993)..... 16-18, 25

State Tax Comm'n v. Fondren, 387 So. 2d 712 (Miss. 1980), *cert. denied*, 450 U.S. 1040 (1981) 21

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Stufflebaum v. Panthiere, 691 S.W.2d 271 (Mo. banc 1985) 20

Sunderland Properties, Inc. v. County of Berks, 750 F. Supp. 704 (E.D. Pa. 1990)..... 12

Wilson v. Garcia, 471 U.S. 261 (1985)..... 17

Zarda v. State, 250 Kan. 364, 826 P.2d 1365, *cert. denied*, 112 S. Ct. 2941 (1992) 18

Zizka v. Water Pollution Control Auth., 195 Conn. 682, 490 A.2d 509 (1985)..... 20

United States Constitution:

U.S. CONST. art. VI, cl. 2..... *passim*

U.S. CONST. amend. XIV, § 1 3

Statutes:

28 U.S.C. § 1257(a)..... 2

28 U.S.C. § 1341..... 3, 22

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... 3, 4, 9, 16, 18, 24

72 Pa. Stat. Ann. § 5020-511..... 5

72 Pa. Stat. Ann. § 5020-518.1 5

72 Pa. Stat. Ann. § 5020-519..... 5

72 Pa. Stat. Ann. § 5350..... 5

Court Rules:

U.S. S. Ct. R. 29.1 iii

Fed. R. Civ. P. 12(b) 5

Pa. R. Civ. P. 1028(a) 5

IN THE

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COUNTY OF BERKS, PENNSYLVANIA, *et al.*,
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Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania, Middle District

PETITION FOR A WRIT OF CERTIORARI

Petitioners County of Berks, Pennsylvania, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania, Middle District, entered in this proceeding on November 10, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, Middle District, is reported in the Atlantic Reporter, *see Murtagh v. County of Berks*, 634 A.2d 179 (Pa. 1993), will be reported in the Pennsylvania State Reports and is reprinted in the appendix hereto, *see* Appendix (App.) at 1a-18a. Substantial excerpts from the Supreme Court of Pennsylvania's opinion were published in The United States Law Week. *See Murtagh v. County of Berks*, 62 U.S.L.W. 2319 (Pa. Nov. 10, 1993).

The opinion of the Commonwealth Court of Pennsylvania is reported, *see Greenwich Township v. Murtagh*, 144 Pa. Commw. 624, 601 A.2d 1352 (1992), and is reprinted in the appendix hereto, *see* App. at 19a-34a.

The order of the Court of Common Pleas of Berks County, Pennsylvania (Davenport, J.) has not been reported. It is reprinted in the appendix hereto. *See* App. at 35a-37a.

JURISDICTION

The Supreme Court of Pennsylvania, Middle District, entered the judgment sought to be reviewed on November 10, 1993. *See* App. at 14a. This Court has jurisdiction to review the judgment of the Supreme Court of Pennsylvania, Middle District, pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Section 1 of the fourteenth amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

> any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Section 1341 of Title 28, United States Code, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Section 1988(b) of Title 42, United States Code, provides:

> **Attorney's fees**
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or

> title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b).

STATEMENT OF THE CASE

On October 31, 1989, Merry J. Murtagh, eight other individuals and one partnership filed suit in the Court of Common Pleas of Berks County, Pennsylvania. Plaintiffs' complaint contained only one count, a claim "pursuant to 42 USC section 1983." *See* App. at 149a.

In their complaint, plaintiffs sought to represent "a class consisting of all owners of real property situated in Berks County who purchased their property since January 1, 1980." App. at 146a. The defendants named in the complaint were the County of Berks, Pennsylvania; the Berks County Board of Assessment Appeals; and the Berks County Board for the Assessment and Revision of Taxes.

Plaintiffs alleged that defendants had adopted a policy, custom and practice of reassessing parcels of real property only upon change in ownership. *See* App. at 147a. The complaint stated that defendants' assessment practices "placed a substantial and disproportionate burden of taxation on those individuals and entities who have acquired real property in Berks County in recent years . . . ." App. at 148a.

With respect to exhaustion of state remedies, plaintiffs asserted in their complaint:

> All named plaintiffs herein have exhausted their administrative remedies. Furthermore, it would be futile for plaintiffs to bring an appeal from the decision of the Board of Assessments pursuant to 72 Pa. C.S.A. Section 5020-518.2 since that provision limits the issues on appeal in such a manner that an

> appeal would not provide redress of the grievances asserted by plaintiffs herein.

App. at 149a.

Defendants County of Berks and Berks County Board of Assessment Appeals each filed preliminary objections[1] to plaintiffs' complaint raising essentially the same four grounds. Three of the four grounds were interrelated and asserted that plaintiffs had failed to exercise or exhaust the statutory and administrative remedies available to them under state law. *See, e.g.*, 72 Pa. Stat. Ann. §§ 5020-511, 5020-518.1, 5020-519 and 5350 (setting forth available statutory and administrative remedies). In the fourth ground, these defendants asserted that plaintiffs had failed to join certain necessary parties, specifically the municipalities and school districts located in Berks County.

In an order dated May 18, 1990, the Court of Common Pleas of Berks County overruled the first three preliminary objections but sustained the fourth, ruling that plaintiffs had failed to join necessary parties.

On June 6, 1990, plaintiffs filed an amended complaint. In addition to including Berks County and the Berks County Board of Assessment Appeals as defendants, the amended complaint named as defendants ninety-four municipalities and school districts located in Berks County. *See* App. at 135a-45a. In all other respects, plaintiffs' amended complaint was identical to their original complaint.

Following service of the amended complaint, many of the newly joined defendants filed preliminary objections. Among the issues raised in those preliminary objections was whether plaintiffs could maintain their 42 U.S.C. § 1983 action despite having failed to pursue

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1. Preliminary objections under Pennsylvania practice are comparable to a Federal Rule of Civil Procedure 12(b) motion under federal practice. *Compare* Pa. R. Civ. P. 1028(a) *with* Fed. R. Civ. P. 12(b).

the plain, adequate and complete administrative and judicial remedies available to them under state law. *See* App. at 130a.

On December 3, 1990, the Court of Common Pleas overruled all pending preliminary objections, including "[w]hether the plaintiffs can maintain this action because they have not exhausted other judicial or administrative remedies." App. at 35a-36a. Thereafter, numerous defendants asked the Court of Common Pleas to amend its order to permit an immediate interlocutory appeal to the Commonwealth Court of Pennsylvania. In an order entered January 23, 1991, the Court of Common Pleas amended its order dated December 3, 1990 to allow an interlocutory appeal. To date, no further proceedings of substance have occurred before the Court of Common Pleas in this matter.

Two groups of defendants, one led by the Borough of Wyomissing Hills and the other headed by Greenwich Township, filed petitions in the Commonwealth Court requesting permission to appeal. In orders dated April 9, 1991 and April 22, 1991, the Commonwealth Court granted the petitions and consolidated the appeals.

In its opening brief on appeal to the Commonwealth Court, the group of defendants led by the Borough of Wyomissing Hills argued that since plaintiffs enjoyed a plain, speedy and efficient remedy under state law to vindicate their constitutional rights, the Court of Common Pleas lacked jurisdiction over plaintiffs' § 1983 challenge to Berks County's system of property tax administration. *See* App. at 109a-15a.

On January 9, 1992, the Commonwealth Court, sitting *en banc*, issued its ruling. *See Greenwich Township v. Murtagh*, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) (reprinted in App. at 19a-34a). The court ruled that plaintiffs could not bring their action under 42 U.S.C. § 1983 because state law provided them with a plain, adequate and complete remedy.

The Commonwealth Court examined at length this Court's decision in *Fair Assessment in Real Estate*

Ass'n, Inc. v. McNary, 454 U.S. 100 (1981). The Commonwealth Court explained that in *McNary*, this Court held that where taxpayers are barred from asserting a § 1983 action against the validity of state or local taxation in federal courts, " '[s]uch taxpayers must seek protection of their federal rights by *state remedies*, provided, of course, that those remedies are *plain, adequate, and complete*, and may ultimately seek review of the state decisions in this court.' " *Greenwich Township*, 144 Pa. Commw. at 629, 601 A.2d at 1354-55 (emphasis in original; footnote omitted) (quoting *McNary*, 454 U.S. at 116 (footnote omitted)) (reprinted in App. at 22a-23a).

The Commonwealth Court proceeded to address plaintiffs' argument that Pennsylvania's state courts are required, under the Supremacy Clause, to entertain their § 1983 claim, regardless of whether the claim circumvents other available adequate state remedies:

> The Supreme Court foreclosed the state courts from expanding or limiting the availability of a federal cause of action because Section 1983 advances federal, and not state rights and interests. By doing so, the Supreme Court, in effect, enunciated a principle that while state courts are required to entertain federal causes of actions, they should be guided by federal law to determine how federal rights are to be enforced, thereby attempting to assure that the outcome of federal causes of actions would be the same, regardless if decided in a state or federal forum.

Id. at 630-31, 601 A.2d at 1355 (footnote omitted) (reprinted in App. at 24a-25a).

The Commonwealth Court noted that the courts of nine states, including the highest courts of eight of those states, had ruled that a § 1983 challenge to state tax administration cannot be brought where state remedies provide the taxpayer with an opportunity to obtain full and adequate relief. *See id.* at 631-32, 601 A.2d at 1355-56 (reprinted in App. at 25a-26a).

The Commonwealth Court also noted that courts in two states had ruled that a taxpayer could maintain a § 1983 action in state court without having exhausted plain, adequate and complete state remedies. *See id.* at 632 n.10, 601 A.2d at 1356 n.10 (reprinted in App. at 26a).

Having surveyed the judicial landscape, the Commonwealth Court announced its holding:

> We join the consensus of other state courts that a Section 1983 challenge to state tax administration is not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief. Both Congress, by enacting the Anti-Tax Injunction Act, and the Supreme Court, by its holding in *Fair Assessment*, prohibiting or declining to exercise jurisdiction, have decided that federal interests are not advanced by allowing federal causes of action to intrude upon a carefully formulated state system designed to rectify state tax disputes. Since federal courts decline to exercise jurisdiction because federal intrusion in state tax schemes is unwarranted, state courts should also not interfere, because its enforcement of Section 1983 is no less intrusive or disruptive than if enforced by a federal court.

Id. at 632, 601 A.2d at 1356 (reprinted in App. at 26a-27a).

The Commonwealth Court then examined whether Pennsylvania's existing statutory remedies provided plaintiffs with a plain, adequate and complete remedy. *See id.* at 633-37, 601 A.2d at 1357-59 (reprinted in App. at 27a-31a). The Commonwealth Court held that plaintiffs could raise and obtain consideration of their constitutional claims by means of existing state statutory remedies. *See id.* The court explained:

> we also hold that the General and Third Class County Assessment Laws provide Taxpayers with a plain, adequate and complete remedy. The statutory

> procedures provide a full hearing before the Board, followed by a de novo judicial determination of the Board's decision by the court of common pleas. Taxpayers may properly raise their constitutional issues before the Board and before the trial court on appeal. Taxpayers present action circumvents the established administrative procedures for reviewing a tax assessment and should be dismissed.

Id. at 636-37, 601 A.2d at 1358-59 (reprinted in App. at 31a). Accordingly, the Commonwealth Court entered an order directing the Court of Common Pleas to dismiss plaintiffs' action for lack of subject matter jurisdiction. *See id.* at 637, 601 A.2d at 1359 (reprinted in App. at 32a).

On February 10, 1992, plaintiffs filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania granted the petition on April 20, 1992. *See Murtagh v. Greenwich Township*, 530 Pa. 635, 606 A.2d 904 (1992).

Plaintiffs argued in the Supreme Court of Pennsylvania that the Commonwealth Court's decision violated the Supremacy Clause. *See* App. at 49a-53a. Plaintiffs also argued that the remedy existing under 42 U.S.C. § 1983 is "more adequate" than the remedies existing under state law because state law does not permit the shifting of attorney's fees allowed under 42 U.S.C. § 1988. *See* App. at 54a.

On November 10, 1993, the Supreme Court of Pennsylvania issued the opinion and judgment sought to be reviewed. *See Murtagh v. County of Berks*, 634 A.2d 179 (Pa. 1993) (reprinted in App. at 1a-18a). The Supreme Court of Pennsylvania characterized the issue before it in the following manner:

> The question presented is whether state courts must entertain section 1983 class actions challenging the constitutionality of a county's tax assessment procedure where plaintiffs have not exhausted state administrative and judicial remedies.

Id. at 181 (reprinted in App. at 3a).

Later in its opinion, the court wrote:

> We now address the critical question of whether the common pleas courts of this Commonwealth must entertain section 1983 cases without requiring the exhaustion of state administrative and judicial remedies. We do not have direction from the United States Supreme Court on this issue; rather, we have competing lines of cases and are asked to resolve the apparent conflict.
>
> One may argue that, according to U.S. Supreme Court precedent, the taxpayers should be no better off in state court than they are in federal court with regard to a section 1983 case challenging the constitutionality of a property tax assessment procedure. According to *Fair Assessment* and its progeny, plaintiffs must exhaust state administrative and judicial remedies in a property tax assessment case before bringing a section 1983 action in federal court. Therefore, the argument continues, the taxpayers must also exhaust state administrative and judicial remedies before bringing a section 1983 action challenging the constitutionality of a property tax assessment procedure in state court.
>
> One may also argue that, according to U.S. Supreme Court precedent, this court cannot require exhaustion of state statutory remedies. If an exhaustion requirement were imposed on the taxpayers, then, like *Felder* [*v. Casey*, 487 U.S. 131 (1988)], the state has a procedure that places conditions on the vindication of a federal right in state court. This is so even though the state's statutory scheme does not eliminate a claimant's right to seek full compensation through suit.

Id. at 184 (reprinted in App. at 11a).

The Supreme Court of Pennsylvania proceeded to hold that the Supremacy Clause prohibited the dismissal

of plaintiffs' suit in favor of requiring exhaustion of the plain, adequate and complete administrative and judicial remedies available under state law. The court wrote:

> In this case, *Felder* and *Howlett* [*v. Rose*, 496 U.S. 356 (1990),] command the Court of Common Pleas of Berks County to exercise jurisdiction over a section 1983 action without requiring the complete exhaustion of state statutory remedies.

Id. at 185 (reprinted in App. at 12a).

Later in its opinion, the Supreme Court of Pennsylvania explained:

> if we were to refuse access to the courts before exhaustion of statutory remedies with respect to this type of class action, such refusal would conflict directly with U.S. Supreme Court directives. Therefore, we hold that where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their section 1983 suit in common pleas court without first exhausting their statutory remedies.

Id. (reprinted in App. at 13a).[2]

---

2. The Supreme Court of Pennsylvania rested its decision wholly upon the Supremacy Clause and thus did not reach the question of whether the Commonwealth Court correctly determined that Pennsylvania's remedies qualify as plain, adequate and complete. *See Murtagh*, 634 A.2d at 182 n.11 (reprinted in App. at 7a).

However, both the United States Court of Appeals for the Third Circuit, which hears appeals from the United States District Courts in Pennsylvania, and the United States District Court for the Eastern District of Pennsylvania, which encompasses Berks County, Pennsylvania, have held that Pennsylvania's state law administrative and judicial remedies for addressing federal constitutional challenges to state or local taxation are plain, adequate and complete. *See Behe v. Chester County Bd. of Assessment Appeals*, 952 F.2d 66, 68 (3d Cir. 1991); *Garrett v. Bamford*, 582 F.2d 810,

Justice Cappy dissented from the judgment of the Supreme Court of Pennsylvania. Justice Cappy wrote that "[a]lthough I do not disagree with the majority's background summary of the relevant law, I differ with the majority's resolution of 'apparent conflict' in the United States Supreme Court's 'competing lines of cases.' " *Id.* at 186 (Cappy, J., dissenting) (reprinted in App. at 16a).

Justice Cappy explained:

> First, it must be remembered that section 1983 creates a *federal* cause of action. The Supreme Court in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981), specifically held that this federal action requires exhaustion of state administrative and judicial remedies due to the sensitive nature of state tax issues. It makes no sense to undercut the Court's interpretation of federal law. . . . The majority's approach creates the anomalous result of encouraging federal claimants to flock to state courts to pursue section 1983 actions, when the precise purpose of the federal rule is to ensure that state courts may deal with the matter under state law first.

Id. (emphasis in original) (reprinted in App. at 17a).

Justice Cappy concluded his dissenting opinion by stating:

> The Supreme Court's decision in *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), in no way compels the majority's result. It must be remembered that for the state courts to require exhaustion of state remedies as a prerequisite to a section 1983 action would only be to impose upon plaintiffs in state court the same requirement that would be imposed upon them in federal court.

NOTES *(Continued)*

815, 817 (3d Cir. 1978); *Sunderland Properties, Inc. v. County of Berks*, 750 F. Supp. 704, 710 (E.D. Pa. 1990).

> *Felder* simply prohibits the application of a state rule where the rule conflicts with the remedial objectives of section 1983 and its enforcement will "frequently and predictably produce different outcomes in 1983 litigation based solely on whether the claim is asserted in state or federal court." 487 U.S. at 138, 108 S. Ct. at 2307. Ironically, the majority's refusal to impose an exhaustion requirement creates just such a situation where different outcomes will be reached in section 1983 litigation "based solely on whether the claim is asserted in state or federal court."
>
> I believe that, in the circumstances of this case, the Court should defer to the framework established by the federal courts. Therefore, I must respectfully dissent.

Id. (reprinted in App. at 18a).

Within ninety days after entry of the judgment of the Supreme Court of Pennsylvania, petitioners, County of Berks, Berks County Board of Assessment Appeals and numerous other local governments and school districts located within Berks County, Pennsylvania, filed this timely Petition for a Writ of Certiorari requesting review and, ultimately, the reversal of the judgment of the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

A profound split of authority exists among state courts of last resort concerning whether the Supremacy Clause prohibits state courts from dismissing suits brought under 42 U.S.C. § 1983 challenging state or local tax administration in favor of the plain, adequate and complete administrative and judicial remedies that exist under state law.

The Court attempted once before to resolve this question when it granted certiorari to review the opinion and judgment of the Supreme Court of South Carolina

in *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386, *cert. granted*, 469 U.S. 879 (1984). Following oral argument, the Court affirmed, by an equally divided Court, the judgment of the Supreme Court of South Carolina. *See Spencer v. South Carolina Tax Comm'n*, 471 U.S. 82 (1985) (per curiam) (Powell, J., not participating).

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), the Court remarked upon the continued uncertainty surrounding the question presented:

> Whether state courts must assume jurisdiction over [tax challenges brought under 42 U.S.C. § 1983] is not entirely clear. See Note, Section 1983 in State Court: A Remedy for Unconstitutional State Taxation, 95 Yale L.J. 414, 420-421 (1985). See also *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386, aff'd by an equally divided Court, 471 U.S. 82 (1984). Of course, an affirmance by an equally divided Court is not entitled to precedential weight. See *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

More recently, in his dissenting opinion in *Dennis v. Higgins*, 498 U.S. 439, 464-65 (1991) (KENNEDY, J., dissenting), JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, wrote:

> Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers. The Tax Injunction Act, 28 U.S.C. § 1341, prevents any attempt in federal court to "enjoin, suspend or restrain" assessment or collection of a state tax, so long as "a plain, speedy and efficient remedy may be had in the courts of such State." The principle of comity likewise prevents a federal court from entertaining

> any action for damages under § 1983 to redress allegedly unconstitutional state taxation. *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100 (1981). Relying upon the "overriding interests of the state in an efficient, expeditious and nondisruptive resolution of . . . tax disputes," *Backus v. Chilivis*, 236 Ga. 500, 505, 224 S.E.2d 370, 374 (1976), state courts have refused to permit plaintiffs to proceed under § 1983 where there exists a complete remedy under state law. *Ibid.*; *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 497, 316 S.E.2d 386, 388-389 (1984), aff'd by an equally divided Court, 471 U.S. 82 (1985) (*per curiam*). These questions now become of paramount importance, as we risk destruction of state fiscal integrity in a manner which may require congressional correction.

Petitioners turn next to demonstrate the conflict that exists among state courts of last resort regarding the federal question presented. Then, petitioners explain why the question presented represents an important question of federal law which has not been, but should be, settled by this Court.

I. State Courts Of Last Resort Are In Conflict With Respect To The Question Presented

The decision of the Supreme Court of Pennsylvania in this action is in direct conflict with the decisions of numerous other state courts of last resort concerning the federal question of whether the Supremacy Clause requires a state court to entertain an action brought under 42 U.S.C. § 1983 challenging the constitutionality of a state or local government's system of taxation where plaintiffs have not exhausted the plain, adequate and complete administrative and judicial remedies that exist under state law.

Here, the Supreme Court of Pennsylvania has held that the Supremacy Clause *prohibits* a state court from

dismissing a tax challenge arising under 42 U.S.C. § 1983 regardless of whether plaintiffs have pursued the plain, adequate and complete remedies available to them under state law. *See Murtagh v. County of Berks*, 634 A.2d 179, 185 (Pa. 1993) (reprinted in App. at 12a-13a).

In contrast, state courts of last resort in Connecticut, Georgia, Iowa, Kansas, Missouri, North Dakota, Oregon, South Carolina, Tennessee and Wisconsin, as well as intermediate appellate courts in Illinois and North Carolina, have held that it *does not* violate the Supremacy Clause to dismiss state court tax challenges arising under 42 U.S.C. § 1983 in favor of requiring plaintiffs to pursue the plain, adequate and complete remedies available under state law.

The decision of the Supreme Court of North Dakota in *State v. Quill Corp.*, 500 N.W.2d 196 (N.D.), *cert. denied*, 114 S. Ct. 173 (1993), best illustrates the conflict. There, Quill Corporation sought to recover its attorney's fees, pursuant to 42 U.S.C. § 1988, for having prevailed in *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992), upon its assertion that North Dakota's requirement that Quill collect and remit state use tax violated the Commerce Clause of the United States Constitution.[3]

In its opinion, the Supreme Court of North Dakota explained:

> The State argued that this case is controlled by *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), in which we held that taxpayers could not bring a § 1983 action in state court to enjoin the assessment of state taxes if there was an adequate remedy available under state law.

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3. In *Dennis v. Higgins*, 498 U.S. 439 (1991), this Court held that suits for violations of the Commerce Clause are cognizable under 42 U.S.C. § 1983. Quill had asserted a timely counterclaim against North Dakota in the state trial court pursuant to 42 U.S.C. § 1983, which the trial court dismissed. *See Quill Corp.*, 500 N.W.2d at 196-97.

> Quill argues that the rationale underlying *Linderkamp* has been rejected by the United States Supreme Court in *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).

Quill Corp., 500 N.W.2d at 197.

After engaging in an extensive examination of this Court's decisions in *Howlett v. Rose*, 496 U.S. 356 (1990), *Felder v. Casey*, 487 U.S. 131 (1988), and *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court of North Dakota wrote:

> The result in *Linderkamp* is entirely consistent with the Congressional desire for uniform intrastate application. Unlike the Wisconsin notice-of-claim statute, which precluded certain plaintiffs from bringing in state court a § 1983 action that could have been brought in federal court, *Linderkamp* preserves uniformity of results in § 1983 actions, whether brought in state or federal court within North Dakota. Under the rationale of *Howlett*, *Felder*, and *Wilson*, application of a state rule that fosters intrastate uniformity of results is consistent with Congressional intent and does not violate the Supremacy Clause.

Quill Corp., 500 N.W.2d at 200.

In further explaining the rationale behind its holding, the Supreme Court of North Dakota quoted directly from its decision in *Linderkamp v. Bismarck Sch. Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986):

> "Recognition that the proscriptions of the Tax Injunction Act are based at least in part upon deference to state remedial schemes leads to the conclusion that a state court § 1983 action, which applies a federal remedial statute for alleged violations of federally-created rights, is no less of a burden upon the state remedial scheme than would be a § 1983 action brought in federal court. This concept has been recognized, albeit in a somewhat

different context, by the United States Court of Appeals for the Seventh Circuit in *LaSalle National Bank v. Rosewell*, 604 F.2d 530, 538-539 (7th Cir. 1979), *rev'd on other grounds*, 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981):

> " 'Defendants' position leads to the scenario of a state court adjudicating a cause of action and formulating a remedy—and throughout required to apply federal law. It would be difficult to say that this is less of an incursion into state autonomy than an action in federal court.' "

Quill Corp., 500 N.W.2d at 201-02 (quoting *Linderkamp*, 397 N.W.2d at 80).

Thus, the Supreme Court of North Dakota rejected Quill's demand for attorney's fees pursuant to 42 U.S.C. § 1988, holding that the state trial court had correctly dismissed Quill's 42 U.S.C. § 1983 claim due to the existence of plain, adequate and complete state remedies. *See Quill Corp.*, 500 N.W.2d at 203.

Also in direct conflict with the Supreme Court of Pennsylvania's ruling in *Murtagh* are the decisions of the Supreme Court of Kansas in *Dean v. State*, 250 Kan. 417, 826 P.2d 1372, *cert. denied*, 112 S. Ct. 2941 (1992), and *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365, *cert. denied*, 112 S. Ct. 2941 (1992). In these decisions, the Supreme Court of Kansas held that the trial court's dismissal of tax challenges arising under 42 U.S.C. § 1983 did not violate the Supremacy Clause where plaintiffs had access to a remedy under state law affording complete and adequate relief.

L.L. Bean, Inc. v. Bracey, 817 S.W.2d 292 (Tenn. 1991), is another decision in direct conflict with the Supreme Court of Pennsylvania's ruling in this case. In *L.L. Bean*, the Supreme Court of Tennessee wrote:

> The Tax Injunction Act of 1937, by its terms, applies to federal courts and not to state courts. However, a majority of states that have considered

> the issue have held that a claim involving state taxes made pursuant to 42 U.S.C. § 1983 that would be barred in federal court because of the Tax Injunction Act should not be heard in a state court if an adequate remedy with respect to the matter is otherwise available.

Id. at 296.

In announcing its holding, the Supreme Court of Tennessee explained:

> As did the high courts of North Dakota and Connecticut, we decline to recognize § 1983 jurisdiction in state court over a matter that would not be cognizable in federal court on the basis of § 1983. To do otherwise would undermine the exclusive authority provided in T.C.A. § 67-1-1804 for determining liability with respect to taxes collected or administered by the Department of Revenue.

Id. at 297.

Similarly, in *Hogan v. Musolf*, 163 Wis. 2d 1, 14, 471 N.W.2d 216, 220-21 (1991) (footnote omitted), *cert. denied*, 112 S. Ct. 867 (1992), the Supreme Court of Wisconsin wrote:

> The Supreme Court, however, has also expressed its view that there are sound policy reasons for courts to refrain from interfering with traditional administrative procedures for addressing tax claims against the state. These policy reasons, which were recognized by the court in *McNary* and acknowledged by Congress in enacting the Tax Injunction Act of 1937, 28 U.S.C. sec. 1341, lead us to conclude that it is not contrary to federal law to impose an exhaustion requirement before entertaining sec. 1983 claims that challenge the administration of a state taxing scheme.

The court proceeded to explain:

> The Supreme Court's primary interest in *McNary* was to avoid interference with state taxing practices by permitting states to have the opportunity to apply their remedies and procedures in tax matters before federal remedies are sought by a sec. 1983 action. We understand *McNary* as indicating that the Court is equally concerned that tax challenges be conducted according to state remedies as it is that they be conducted in a state forum. It would be no less disruptive of the state's internal economy and administrative tax procedures for a state court to act under sec. 1983 and suspend the usual tax collection and refund procedures of the state than it would be for a federal court to do so. In addition, regardless of which court interferes with the state's fiscal operations, tax officials would be improperly denied the opportunity to rectify any alleged impropriety before being subject to a sec. 1983 action. Accordingly, we conclude that the policies which motivated the Court's decision in *McNary* are equally applicable to sec. 1983 actions in state court.

Id. at 18, 471 N.W.2d at 222.

The Supreme Court of Wisconsin thus held: "[w]e therefore conclude that federal law permits Wisconsin to require plaintiffs to exhaust state tax remedies if those remedies are plain, adequate, and complete." *Id.* at 19, 471 N.W.2d at 223.

As noted, the Supreme Court of Pennsylvania's decision in *Murtagh* is also in conflict with the decisions of the Supreme Court of Iowa, *see McManus v. State of Iowa, Dep't of Revenue & Fin.*, 499 N.W.2d 726 (Iowa), *cert. denied*, 114 S. Ct. 580 (1993); the Supreme Court of Oregon, *see Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied*, 112 S. Ct. 867 (1992); the Supreme Court of Missouri, *see Stufflebaum v. Panthiere*, 691 S.W.2d 271 (Mo. banc 1985); the Supreme Court of Connecticut, *see Zizka v. Water Pollution Control Auth.*, 195 Conn. 682, 490 A.2d 509 (1985); the

Supreme Court of South Carolina, *see Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided Court*, 471 U.S. 82 (1985) (per curiam) (Powell, J., not participating); and the Supreme Court of Georgia, *see Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976).[4]

In contrast to the numerous decisions in conflict with the Supreme Court of Pennsylvania's decision in *Murtagh*, just one other state court of last resort has ever held that the Supremacy Clause *prohibits* a state court from dismissing a tax challenge arising under 42 U.S.C. § 1983 in favor of the plain, adequate and complete administrative and judicial remedies existing under state law. *See Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 862-64 (Miss. 1988). In *Burrell*, the Supreme Court of Mississippi renounced its earlier holding in *State Tax Comm'n v. Fondren*, 387 So. 2d 712, 723 (Miss. 1980), *cert. denied*, 450 U.S. 1040 (1981), where the court had held that a tax challenge arising under 42 U.S.C. § 1983 "must fail in the state court because it would have failed if it had been filed first in federal court."

The only other courts to have ruled in harmony with the Supreme Court of Pennsylvania's ruling in *Murtagh* are the Tax Court of Indiana, *see Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Revenue*, 583 N.E.2d 214 (Ind. Tax Ct. 1991), and a New Jersey state trial court, whose decision to entertain a § 1983 tax challenge was driven by New Jersey's "entire controversy doctrine," which requires all aspects of a controversy to be sued upon at once, *see Bung's Bar & Grille, Inc. v. Township Council*, 206 N.J. Super. 432, 461-62, 502 A.2d 1198, 1215-16 (Law Div. 1985).

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4. The Supreme Court of Pennsylvania's decision in *Murtagh* is also in conflict with intermediate appellate court decisions in Illinois and North Carolina. *See Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986); *Johnson v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *review denied*, 313 N.C. 508, 329 S.E.2d 392 (1985).

As demonstrated above, state courts of last resort are in direct conflict concerning whether, consistent with the Supremacy Clause, a state court may dismiss a challenge to state or local taxation arising under 42 U.S.C. § 1983 in favor of plain, adequate and complete remedies existing under state law.

Petitioners respectfully request that the Court grant this Petition for a Writ of Certiorari to resolve this conflict and that, following briefing on the merits and oral argument, the judgment of the Supreme Court of Pennsylvania be reversed.

II. This Petition Presents An Important Question Of Federal Law That Has Not Been, But Should Be, Resolved By This Court

As a result of the Tax Injunction Act, 28 U.S.C. § 1341, it is well-settled that an action challenging state or local taxation arising under 42 U.S.C. § 1983 that seeks injunctive relief may not be brought in federal court if a plain, speedy and efficient remedy exists under state law. *See* 28 U.S.C. § 1341.

As a result of the Court's decision in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), it is beyond cavil that federal courts are prohibited from entertaining a declaratory judgment proceeding challenging the validity of a state tax if the state law remedy is plain, adequate and complete.

Furthermore, as a result of this Court's decision in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), it is indisputable that a federal court may not hear a damages action arising under 42 U.S.C. § 1983 challenging state or local taxation where a plain, adequate and complete remedy exists under state law. The Court held in *McNary*:

> Therefore, despite the ready access to federal courts provided by *Monroe* [*v. Pape*, 365 U.S. 167 (1961),] and its progeny, we hold that taxpayers are barred by the principle of comity from asserting

> § 1983 actions against state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.

McNary, 454 U.S. at 116 (footnote omitted).[5]

Despite having determined how *federal* courts must respond to 42 U.S.C. § 1983 challenges against state and local taxation, this Court has yet to resolve whether *state* courts—essentially the only remaining forum in which to assert § 1983 challenges to state and local taxation—are required under the Supremacy Clause to entertain such challenges without regard to the existence of plain, adequate and complete remedies under state law.

The Court noted the uncertainty surrounding the question presented in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), writing:

> Whether state courts must assume jurisdiction over [tax challenges brought under 42 U.S.C. § 1983] is not entirely clear. See Note, Section 1983 in State Court: A Remedy for Unconstitutional State Taxation, 95 Yale L.J. 414, 420-421 (1985). See also *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 316 S.E.2d 386, aff'd by an equally divided Court, 471 U.S. 82 (1984). Of course, an affirmance by an equally divided Court is not entitled to precedential weight. See *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

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5. In the omitted footnote, the Court wrote: "[w]e discern no significant difference, for purposes of the principles recognized in this case, between remedies which are 'plain, adequate, and complete,' as that phrase has been used in articulating the doctrine of equitable restraint, and those which are 'plain, speedy and efficient,' within the meaning of § 1341." *McNary*, 454 U.S. at 116 n.8.

In its opinion, the Supreme Court of Pennsylvania acknowledged the uncertainty surrounding the question presented, writing: "[w]e do not have direction from the United States Supreme Court on this issue; rather, we have competing lines of cases and are asked to resolve the apparent conflict." *Murtagh*, 634 A.2d at 184 (reprinted in App. at 11a). In his dissent, Justice Cappy also noted the uncertainty, stating: "[a]lthough I do not disagree with the majority's background summary of the relevant law, I differ with the majority's resolution of the 'apparent conflict' in the United States Supreme Court's 'competing lines of cases.' " *Id.* at 186 (Cappy, J., dissenting) (reprinted in App. at 16a).

As a consequence of the uncertainty surrounding the question presented, plaintiffs able to file suit in the state courts of Pennsylvania, Mississippi, Indiana or New Jersey will have courts ready to entertain their 42 U.S.C. § 1983 tax challenges despite the existence of plain, adequate and complete remedies under state law. By contrast, plaintiffs who file suit in the state courts of Connecticut, Georgia, Illinois, Iowa, Kansas, Missouri, North Carolina, North Dakota, Oregon, South Carolina, Tennessee and Wisconsin will have their 42 U.S.C. § 1983 tax challenges dismissed in favor of plain, adequate and complete remedies available to them under state law.

Government entities such as petitioners will feel in their treasuries the severe impact of rulings that the Supremacy Clause requires state courts to entertain § 1983 tax challenges despite the existence of plain, adequate and complete state law remedies. As a result of being subject to suit in Pennsylvania, petitioners face the possibility of being held liable to any successful plaintiffs for their attorney's fees and costs pursuant to 42 U.S.C. § 1988.

By contrast, government entities fortunate enough to be situated in States where ready access to state courts for 42 U.S.C. § 1983 tax challenges is not understood to be commanded by the Supremacy Clause are

likely not to incur liability for their adversary's attorney's fees, even if their adversary prevails. *See, e.g., State v. Quill Corp.*, 500 N.W.2d at 203 ("We hold that Quill's § 1983 claim was properly dismissed in accordance with our holding in *Linderkamp*. Accordingly, Quill is not entitled to recover its attorney's fees under § 1988."); *Spencer v. South Carolina Tax Comm'n*, 281 S.C. at 496-97, 316 S.E.2d at 388-89 (denying attorney's fees to prevailing parties after refusing to allow prevailing parties to characterize their tax challenge as a 42 U.S.C. § 1983 action).

This Court viewed the question presented herein as deserving of certiorari when it granted review of the Supreme Court of South Carolina's opinion and judgment in *Spencer*. Unfortunately, only eight Justices were able to participate in considering *Spencer* on its merits. While four Justices apparently voted to affirm the judgment of the Supreme Court of South Carolina, the remaining four Justices appear to have disagreed. As a result, the decision of the Supreme Court of South Carolina was affirmed by an equally divided Court. *See Spencer v. South Carolina Tax Comm'n*, 471 U.S. 82 (1985) (per curiam) (Powell, J., not participating).

The pressing need to have the question presented herein resolved promptly and decisively was emphasized best by JUSTICE KENNEDY in his dissenting opinion in *Dennis v. Higgins*, 498 U.S. 439, 464-65 (1991) (KENNEDY, J., dissenting). There, JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, explained:

> Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers. The Tax Injunction Act, 28 U.S.C. § 1341, prevents any attempt in federal court to "enjoin, suspend or restrain" assessment or collection of a state tax, so long as "a plain, speedy and efficient remedy may be had in the courts of such State." The principle of comity likewise prevents a federal court from entertaining

> any action for damages under § 1983 to redress allegedly unconstitutional state taxation. *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100 (1981). Relying upon the "overriding interests of the state in an efficient, expeditious and nondisruptive resolution of . . . tax disputes," *Backus v. Chilivis*, 236 Ga. 500, 505, 224 S.E.2d 370, 374 (1976), state courts have refused to permit plaintiffs to proceed under § 1983 where there exists a complete remedy under state law. *Ibid.*; *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 497, 316 S.E.2d 386, 388-389 (1984), aff'd by an equally divided Court, 471 U.S. 82 (1985) (*per curiam*). These questions now become of paramount importance, as we risk destruction of state fiscal integrity in a manner which may require congressional correction.

Id.

Petitioners agree with JUSTICE KENNEDY and THE CHIEF JUSTICE that the question presented herein is of "paramount importance."

Accordingly, because the Supreme Court of Pennsylvania has decided a federal question of utmost importance that has not been, but should be, settled by this Court, petitioners respectfully pray that the Court grant this Petition for a Writ of Certiorari and, after briefing and oral argument, reverse the judgment of the Supreme Court of Pennsylvania.

CONCLUSION

Because the question presented represents a federal question as to which state courts of last resort are in conflict, and because the question presented constitutes an important question of federal law which has not been, but should be, settled by this Court, petitioners respectfully pray that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH et al.,	:No. 34 M.D. Appeal :Docket 1992 :
Appellants	:Appeal from the Order :of the Commonwealth :Court dated January 9, :1992, at Nos. 625 C.D. :1991 and 771 C.D. :1991, reversing the :Amended Order of the :Court of Common Pleas
v.	:of Berks County, dated :March 7, 1991, at No. :5182-89 AD : :144 Pa.Cmwlth. 624, :601 A.2d 1352 (1992)
COUNTY OF BERKS, et al.,	:
Appellees	:ARGUED: March 8, :1993

OPINION OF THE COURT

MR. JUSTICE FLAHERTY
DECIDED: NOVEMBER 10, 1993

Merry J. Murtagh and other taxpayers appeal an order of Commonwealth Court reversing an order of the Court of Common Pleas of Berks County and remanding with instructions to dismiss the action for lack of subject matter jurisdiction. The trial court had concluded that it had subject matter jurisdiction over a class action brought by the taxpayers against the County of Berks and other local government units under 42 U.S.C. § 1983[1] challenging the constitutionality of the manner

1. 42 U.S.C. § 1983 (1988) creates a remedy for violations of federal rights committed by persons acting under color of state law.

in which property is assessed for real estate tax purposes.

The taxpayers, representing a class of recent purchasers of real estate in Berks County, filed an amended complaint, after exhausting state administrative remedies, against the local governments.[2] They asserted that the local governments had adopted a discriminatory "Welcome Stranger" policy. This policy results in the reassessment of recently purchased realty based on the purchase price while making no modifications in the assessment of comparable property not recently sold.[3] The taxpayers alleged that this practice violated their

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NOTES *(Continued)*

Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. The taxpayers originally sued the County of Berks, the Berks County Board for the Assessment and Revision of Taxes and the Berks County Board of Assessment Appeals. The county and the board filed a number of preliminary objections to taxpayers' complaint. The trial court sustained only one of the objections finding that taxpayers had failed to sue the taxing authorities which were indispensable parties. As a result, taxpayers filed an amended complaint joining all taxing authorities in the county, nearly 100 cities, boroughs, townships and school districts, herein referred to as the local governments.

3. The Constitution and statutes of the Commonwealth embody a system of taxation that requires property to be taxed at a uniform rate according to its estimated actual market value. *See* Pa. Const. art. VIII, § 1; 72 Pa.C.S. § 5020-101 *et seq.* and § 5342 *et seq.*

The Commonwealth Court recently invalidated a county tax assessment scheme where it found that the county violated the uniformity requirement of the state Constitution and equalization requirement of the statute governing assessments by third-class counties. *See City of Lancaster v. County of Lancaster,* 143 Pa. Cmwlth. 476, 599 A.2d 289 (1991).

equal protection rights under the Fourteenth Amendment and, because the reassessments were done under color of state law, constituted a violation of 42 U.S.C. § 1983.[4]

The local government defendants filed preliminary objections to the amended complaint based on, among other things, a lack of subject matter jurisdiction. The trial court dismissed both sets of preliminary objections, and certified the issue for appeal pursuant to Pa.R.A.P. 1311(b). Commonwealth Court granted separate petitions for permission to appeal the order, consolidated the appeals, and reversed.

The question presented is whether state courts must entertain section 1983 class actions challenging the constitutionality of a county's tax assessment procedure where plaintiffs have not exhausted state administrative and judicial remedies. The local governments contend that the trial court does not have subject matter jurisdiction over such a section 1983 action, arguing that state courts should follow the direction of the federal courts and refrain from entertaining such suits where there are plain, adequate and complete state administrative and judicial remedies.[5]

---

4. The substance of the taxpayers' complaint is that the "Welcome Stranger" policy of Berks County causes *de facto* discrimination and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Taxpayers cite, as authority for their claim, *Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County,* 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). There, the Supreme Court held that the *de facto* discrimination engendered by a "Welcome Stranger" policy in a "current value" taxation system violated said Equal Protection Clause. *See also Nordlinger v. Hahn,* __ U.S. __, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992).

Given the procedural posture of this case, it is inappropriate to comment on the merits of the taxpayers' case.

5. The local governments further argue that some state courts have refrained from entertaining such suits. *See, e.g., Backus v. Chilivis,* 236 Ga. 500, 224 S.E.2d 370 (1976). Since these cases

Federal courts have routinely refrained from interfering with the administration of state taxes due to the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity. In *Fair Assessment In Real Estate v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), the Supreme Court of the United States ruled that actions for injunctive relief and monetary damages from a state property assessment procedure are barred in the federal courts by the principle of comity. That court said that comity concerns motivated congress to pass the Tax Injunction Act which prohibits a district court from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.[6] 454 U.S. at 103, 102 S.Ct. at 179,

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NOTES *(Continued)*

pre-date important Supreme Court cases discussed *infra,* we do not find them probative of the issue presented.

Courts that do require their courts to hear section 1983 actions before exhaustion of state statutory remedies include Mississippi and New Jersey. *Burrell v. Mississippi State Tax Commission,* 536 So.2d 848 (Miss. 1988) and *Bung's Bar & Grille, Inc. v. Florence Township,* 206 N.J.Super. 432, 502 A.2d 1198 (1985). In *Burrell,* the court held that state courts must hear taxpayers' actions brought pursuant to Section 1983, because they have concurrent jurisdiction with the federal courts, because the Supremacy Clause of the United States Constitution requires that state courts enforce the valid enactments of Congress, of which section 1983 is one, and because the principle of comity did not apply to state courts. In *Bung's Bar,* the Superior Court held that the state courts must entertain section 1983 actions, since New Jersey law demands that all issues of a controversy be included at the same time in a lawsuit and the available administrative remedy did not allow for civil rights claims. Neither court addressed the exhaustion of remedies argument.

See also Nutbrown v. Munn, 311 Ore. 328, 811 P.2d 131 (1990); *Hogan v. Musolf,* 471 N.W.2d 216 (Wisc. 1991), and *L.L. Bean Inc. v. Bracey,* 817 S.W.2d 292 (Tenn. 1991). In these cases, section 1983 actions were entertained by state courts.

6. The Tax Injunction Act of 1937, 28 U.S.C. § 1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where

70 L.Ed.2d at 275. By enacting that statute, congress recognized that the autonomy and fiscal stability of states survive best when their tax systems are not subject to scrutiny in federal courts. 454 U.S. at 102-03, 102 S.Ct. at 179, 70 L.Ed.2d at 275. The Supreme Court of the United States also ruled that a similar action for monetary damages is likewise barred as long as the state provides for plain, adequate and complete remedies, because such actions are just as intrusive to the states' revenue collection systems as the actions for injunctive relief specifically barred under the Tax Injunction Act. 454 U.S. at 114-15, 102 S.Ct. at 185, 70 L.Ed.2d at 282. The court then stated that such taxpayers are to seek protection of their federal rights by state remedies provided that those remedies are plain, adequate, and complete and may ultimately seek review of the state decisions in the Supreme Court of the United States. 454 U.S. at 116, 102 S.Ct. at 186, 70 L.Ed.2d at 283.[7]

State courts are not bound by *Fair Assessment* and its progeny. The Tax Injunction Act applies by its very terms to preclude federal courts, not state courts, from enjoining state tax schemes. Therefore, there is no danger of federal court interference or misunderstanding. Likewise, abstention based on comity has no application when a section 1983 cause of action is brought in state courts because there is no risk of federal court interference.[8]

NOTES *(Continued)*

a plain, speedy and efficient remedy may be had in the courts of such state.

7. The Court discerned no significant difference between remedies which are "plain, adequate, and complete" as the phrase is used to articulate the doctrine of equitable constraint under comity, and those that are "plain, speedy and efficient," within the meaning of the Tax Injunction Act. *Fair Assessment,* 454 U.S. at 116 n.8, 102 S.Ct. at 186 n.8, 70 L.Ed.2d at 283 n.8.

8. On the other hand, the federal courts have followed *Fair Assessment* in cases similar to the Taxpayers' case. *e.g., Sunderland Properties, Inc. v. County of Berks,* 750 F.Supp. 704 (E.D.Pa. 1990). There, a challenge to the county's "Welcome Strangers"

The local governments nonetheless argue that the state courts should abstain from hearing section 1983 claims until the taxpayers have exhausted state administrative and judicial remedies. They appear to argue that section 1983 plaintiffs in state court should be no better off than section 1983 plaintiffs in federal court. Therefore, they should be required to exhaust the administrative and judicial remedies set forth in the Third Class County Assessment Law (TCCAL)[9] and in the General County Assessment Law (GCAL).[10] Under both

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NOTES *(Continued)*
policy was dismissed by the court based upon comity and the Tax Injunction Act of 1937, 28 U.S.C. § 1341.

9. Act of June 26, 1931, P.L. 1379, *as amended,* 72 P.S. §§ 5342-5350. This act does not have an official name but is commonly referred to as the Third Class County Assessment Law.

The Third Class County Assessment Law creates a three-member board of assessment appeals (board) in each county. Aggrieved taxpayers appeal to the board and then to the county common pleas court. The board must cause annual assessment of property within its jurisdiction. Section 1 and 3 of the TCCAL; 72 P.S. §§ 5342, 5344. Property owners subject to these assessments must be duly notified. Section 8(b) of the TCCAL; 72 P.C. § 5349(b). A property owner who is aggrieved by any assessment, whether or not the assessment has been changed from the previous year, has a right to appeal to the board for relief. Section 8(c) of the TCCAL; 72 P. S. § 5349(c). When such an appeal has been filed, the board must notify each person and each taxing district which has an interest and has the power to compel the attendance of witnesses and the furnishing of documents. Section 8(d) of the TCCAL; 72 P.S. § 5349(d).

Section 9 of the Third Class County Assessment Law further provides that the aggrieved property owner may appeal the final decision of the board to the county court of common pleas. 72 P.S. § 5350. The court of common pleas will proceed *de novo. Appeal of U.S. Steel Corp.,* 436 Pa. 435, 260 A.2d 779 (1970).

10. Act of May 22, 1933, P.L. 853 *as amended,* 72 P.S. §§ 5020-601 – 5020-602.

The General County Assessment Law applies to Berks County, where it is not inconsistent with the Third Class County Assessment Act. Art. I, § 105 of the GCAL; 72 P.S. § 5020-105. *Truck Terminal Motels of America, Inc. v. Berks County Board of Assessment Appeals,* 127 Pa.Cmwlth. 408, 561 A.2d 1305 (1989), petition for allowance of appeal denied, 525 Pa. 652, 581 A.2d 576 (1990). It

schemes, a property owner who is aggrieved by any property tax assessment has a right to appeal to a board of assessment appeals, and then to the court of common pleas which is to proceed *de novo*. In light of the resolution of this case, we need not and do not decide here whether the state statutory remedies are plain, adequate and complete in the context of a section 1983 class action.[11]

The Supreme Court of the United States has consistently affirmed the duty of state courts to entertain section 1983 actions, except where a valid excuse exists, regardless of whether plaintiffs have exhausted state administrative and judicial remedies. Municipalities

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NOTES *(Continued)*

has a procedural remedy similar to that of the Third Class County Assessment Act. The General County Assessment Law provides that the board in each county shall hear property owners' appeals of tax assessments. Art. V, § 511 of the GCAL; 72 P.S. §§ 5020-511. The decision of the board can then be appealed to a court of common pleas for a *de novo* proceeding, with further appeals to the Superior and Supreme Courts. Art. V, 518.1, 518.2, and 519 of the GCAL; 72 P.S. §§ 5020-518.1-2, 5020-519.

11. Taxpayers contend that the state remedies are not plain, adequate and complete because they are precluded from seeking an award of attorneys' fees via the fee shifting policy embodied in §§ 1983 and 1988. We need not address this issue in light of the resolution of this case.

It is noted that the federal courts in Pennsylvania have consistently ruled that both of these laws provide a taxpayer a plain, adequate, and complete remedy. *See, e.g., Garrett v. Bamford,* 582 F.2d 810 (3d Cir. 1978). The *Garrett* court held that the district court properly abstained from entertaining a section 1983 class action challenging alleged discriminatory property tax assessments brought by property owners in Berks County. The court held that the class action was precluded in federal court under the Tax Injunction Act, since the Third Class County Assessment Law, affording administrative appeal with judicial review to a class, provided them with a plain, speedy and efficient remedy. *Id.* at 819.

Garrett predated significant Supreme Court rulings in section 1983 litigation and did not address the attorneys' fees issue. Therefore, it would have little probative value to this case were we to address the issue of whether the state remedies are plain, adequate and complete.

may be sued under section 1983 when a municipal policy, ordinance, regulation or custom inflicts constitutional injury. *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Since 1980, the Supreme Court of the United States has made clear that state courts have concurrent jurisdiction with federal courts to hear section 1983 claims. *Maine v. Thibout,* 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). When state courts entertain federal causes of action, the rights of, and the defenses to, a federal cause of action are defined by federal law so that the outcome of federal causes of action would be the same, regardless if decided in a state or federal forum. *Howlett v. Rose,* 496 U.S. 356, 375, 110 S.Ct. 2430, 2442, 110 L.Ed.2d 332, 353 (1990).[12] Also, in the absence of a valid excuse, state courts have no discretion to decline to accept jurisdiction when the parties and controversy are properly before the state court. 496 U.S. at 369, 110 S.Ct. at 2439, 110 L.Ed.2d at 348.

A valid excuse may exist when a state court refuses jurisdiction because it has no competent court to hear the case or because of a neutral state rule of judicial administration, unless that rule is preempted by federal law. *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the state create a court competent to hear the case in which the federal claim is presented. *Howlett,*

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12. The Court in *Howlett* reaffirmed that federal law is enforceable in state courts because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the state legislature. 496 U.S. at 367, 110 S.Ct. at 2438, 110 L.Ed.2d at 347. The Court held that a state-law sovereign immunity defense is not available to a school board in a section 1983 action brought in a state court that otherwise has jurisdiction when such a defense would not be available if the action were brought in a federal forum. 496 U.S. at 361-83, 110 S.Ct. at 2434-47, 110 L.Ed.2d at 343-58.

496 U.S. at 372, 110 S.Ct. at 2441, 110 L.Ed.2d at 350-351. Neutral rules of judicial administration have included those authorizing dismissal of both federal and state claims where neither the plaintiff nor the defendant was a resident of the forum state, *Douglas v. New York, N.H. & H.R. Co.,* 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed.2d 747 (1929), where the cause of action arose outside of the court's territorial jurisdiction, *Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945), or where the doctrine of *forum non conveniens* appropriately applied. *Missouri ex rel. Southern R. Co. v. Mayfield,* 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed.2d 3 (1950).

Neutral state rules of judicial administration appear to be preempted in section 1983 cases, however, in situations where the plaintiff and defendant are residents of the forum state and the cause of action arises in the forum state. The Supreme Court of the United States has ruled that section 1983 plaintiffs are not required to exhaust state administrative remedies before instituting section 1983 suits in federal courts or state courts. *See Patsy v. Board of Regents of Florida,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) and *Felder v. Casey, supra,* respectively. In *Felder,* nine months after being allegedly beaten by Milwaukee police officers who arrested Felder on a disorderly conduct charge that was later dropped, Felder filed a state court action against the city and certain of the officers under section 1983. He alleged that the beating and arrest were racially motivated and violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. The officers moved to dismiss the suit because of Felder's failure to comply with Wisconsin's notice-of-claim statute. The statute provided, in part, that: before suit may be brought in state court against a state or local governmental entity or officer, the plaintiff, within 120 days of the alleged injury, must notify the defendant of the circumstances and amount of the claim and the plaintiff's intent to hold the named defendant liable; the defendant then had 120 days to

grant or disallow the requested relief; and the plaintiff must bring suit within six months of receiving notice of disallowance. 487 U.S. at 134-37, 108 S.Ct. at 2305-06, 101 L.Ed.2d at 135-37.

The *Felder* Court held that when a section 1983 action is brought in the state court, Wisconsin's notice-of-claim statute conflicted in both its purpose and effect with section 1983's remedial objectives and was pre-empted pursuant to the Supremacy Clause. The court explained that while states retain the authority to prescribe the rules and procedures governing suits in their courts, that authority does not permit states to place conditions on the vindication of a federal right. Rather, congress meant to provide individuals immediate access to the federal courts and did not contemplate that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the state officials whose hostility to those rights precipitated their injuries. 487 U.S. at 147-53, 108 S.Ct. at 2311-14, 101 L.Ed.2d at 143-47.

The *Felder* court found no merit to the claim that the exhaustion requirement imposed by the state statute is essentially *de minimis* because the statutory settlement period entailed none of the additional expense or undue delay typically associated with administrative remedies, the statutory scheme did not eliminate a claimant's right to seek full compensation through suit or the statutory scheme was designed to sift out specious claims. That court emphasized that section 1983 actions "belong in court" and exist independent of any other legal or administrative relief that may be available as a matter of federal or state law except where congress has expressly imposed an exhaustion requirement.[13] The court said

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13. Congress did establish an exhaustion requirement for a specific class of section 1983 actions, those brought by adult prisoners challenging the conditions of their confinement, in the Civil Rights of Institutionalized Persons Act of 1980, 94 Stat. 353, 42 U.S.C. § 1997e. In *Felder*, the Court stated that congress, in enacting this statute, expressly recognized that it was working a

that any scheme designed to sift out "specious claims" from the stream of complaints that can inundate local governments in the absence of sovereign immunity is "manifestly inconsistent" with the central objective of the civil rights statutes. 487 U.S. at 148-50, 108 S.Ct. at 2312-13, 101 L.Ed.2d at 144-45.

We now address the critical question of whether the common pleas courts of this Commonwealth must entertain section 1983 cases without requiring the exhaustion of state administrative and judicial remedies. We do not have direction from the United States Supreme Court on this issue; rather, we have competing lines of cases and are asked to resolve the apparent conflict.

One may argue that, according to U.S. Supreme Court precedent, the taxpayers should be no better off in state court than they are in federal court with regard to a section 1983 case challenging the constitutionality of a property tax assessment procedure. According to *Fair Assessment* and its progeny, plaintiffs must exhaust state administrative and judicial remedies in a property tax assessment case before bringing a section 1983 action in federal court. Therefore, the argument continues, the taxpayers must also exhaust state administrative and judicial remedies before bringing a section 1983 action challenging the constitutionality of a property tax assessment procedure in state court.

One may also argue that, according to U.S. Supreme Court precedent, this court cannot require exhaustion of state statutory remedies. If an exhaustion requirement were imposed on the taxpayers, then, like *Felder*, the state has a procedure that places conditions on the vindication of a federal right in state court. This is so even though the state's statutory scheme does not eliminate a claimant's right to seek full compensation through suit. Further, we are mindful that the taxpayers' case has another aspect that was not present in

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NOTES *(Continued)*

change in the law. 487 U.S. at 149, 108 S.Ct. at 2312, 101 L.Ed.2d at 144.

Felder, which is that exhaustion of state administrative and judicial remedies in the taxpayers' case may entail the additional expense and delay typically associated with state statutory remedies without according the taxpayers the relief sought. *See, Borough of Greentree v. Board of Property Assessment, Appeals and Review of Allegheny County,* 459 Pa. 268, 328 A.2d 819 (1974).[14]

Here, the record reflects that the taxpayers have exhausted state administrative procedures and, without pursuing their state judicial remedies, seek to maintain a section 1983 class action. In this case, *Felder* and *Howlett* command the Court of Common Pleas of Berks County to exercise jurisdiction over a section 1983 action without requiring the complete exhaustion of state statutory remedies. While exhaustion of state statutory remedies is required in federal courts, exhaustion is not required in the courts of this state insofar as the action is a class action challenging the constitutionality of a system of property tax assessment. This is so because the principle of comity that causes a federal court to refrain from exercising jurisdiction over section 1983 tax assessment cases has no relevance to a class action challenging, in state court, the constitutionality of a system of property tax assessment.

This creates the anomalous situation that plaintiffs have quicker access to state courts with respect to these types of section 1983 class actions than to the federal courts. This result does not appear to conflict with any U.S. Supreme Court decision because the vindication of

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14. In *Greentree,* this Court ruled that courts of common pleas have equitable jurisdiction to hear cases charging that the Assessment Act provision permitting triennial assessments violated the uniformity clause of the State Constitution and the equal protection clause of the Federal Constitution, where the statutory appeal procedure appearing in the Assessment Act would be of little, if any, utility in determining constitutionality of the provision and where any benefit derived from filing individual appeals with the county board of property assessment would be far outweighed by the inconvenience, delay and expense involved.

a federal right is not shackled by state rules of judicial administration. This resolution also does not appear to conflict with precedent of this Court. *See Borough of Greentree, supra.* Further, this resolution will not, as local governments contend, disrupt state and local tax administration because, as the taxpayers argue, constitutional challenges such as the taxpayers' class-action challenge probably will, in the long run, significantly reduce the inconvenience, inefficiency, delay and expense involved in countless individual lawsuits over the same issue in many different administrative and judicial forums.[15]

On the other hand, if we were to refuse access to the courts before exhaustion of statutory remedies with respect to this type of class action, such refusal would conflict directly with U.S. Supreme Court directives. Therefore, we hold that where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their section 1983 suit in common pleas court without first exhausting their statutory remedies.[16]

The Court of Common Pleas of Berks County properly determined that it had subject matter jurisdiction in this case and this matter is remanded to Commonwealth

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15. The local governments, on page 27 of their brief, state that because taxpayers do not press the issue on appeal, it is "undisputed that they can secure consideration of the constitutional objections before the board of assessment appeals and through *de novo* review in the court of common pleas." The local governments, however, argue the point no further, perhaps in recognition that the likelihood that the issue would be fully addressed, on the administrative side, by the very people who depend on the continued existence of the present scheme of things is quite small indeed.

16. We wait for another day to address the issue of whether an individual plaintiff, as opposed to a class of plaintiffs, can maintain a section 1983 action in common pleas court without exhausting state statutory remedies where the challenge is to an individual assessment and not a challenge to the entire system of property tax assessment.

Court with direction to address the local governments' contentions contained in their appeal at 625 C.D. 1991.

Order of the Commonwealth Court reversed, and case remanded.

Mr. Justice Larsen did not participate in the decision of this case.

Mr. Justice Montemuro files a concurring opinion.

Mr. Justice Cappy files a dissenting opinion.

JUDGMENT ENTERED:
NOVEMBER 10, 1993

/s/ Shirley Bailey
CHIEF CLERK

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al.,	: No. 34 M.D. Appeal : Docket 1992 :
Appellants	: Appeal from the Order : of the Commonwealth : Court dated January 9, : 1992, at Nos. 625 C.D. : 1991 and 771 C.D. : 1991, reversing the : Amended Order of the : Court of Common Pleas
v.	: of Berks County, dated : March 7, 1991, at No. : 5182-89 AD. :
	: 144 Pa. Commw. 624, : 601 A.2d 1352 (1992)
COUNTY OF BERKS, et al.,	:
Appellees	: ARGUED: March 8, : 1993

CONCURRING OPINION

MR. JUSTICE MONTEMURO
DECIDED: NOVEMBER 10, 1993

By implication, the majority acknowledges that our courts have an obligation to entertain a 1983 challenge to a state tax despite the existence of a statutory remedy. Because I believe that our courts have always had such an obligation, I join the Opinion of the Court.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, et al.,	: No. 34 M.D. Appeal : Docket 1992 :
Appellants	: Appeal from the Order : of the Commonwealth : Court dated January 9, : 1992, at Nos. 625 C.D. : 1991 and 771 C.D. : 1991, reversing the : Amended Order of the : Court of Common Pleas
v.	: of Berks County, dated : March 7, 1991, at No. : 5182-89 AD. :
	: 144 Pa. Commw. 624, : 601 A.2d 1352 (1992)
COUNTY OF BERKS, et al.,	:
Appellees	: ARGUED: March 8, : 1993

DISSENTING OPINION

MR. JUSTICE CAPPY
DECIDED: NOVEMBER 10, 1993

I respectfully dissent from the majority's holding that the Appellant class of taxpayers, who seek to challenge the constitutionality of the property tax assessment system, may maintain their action under 42 U.S.C. § 1983 in common pleas court without first exhausting their state statutory remedies. Although I do not disagree with the majority's background summary of the relevant law, I differ with the majority's resolution of the "apparent conflict" in the United States Supreme Court's "competing lines of cases." (Majority opinion at 12.)

First, it must be remembered that section 1983 creates a *federal* cause of action. The Supreme Court in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271 (1981), specifically held that this federal action requires exhaustion of state administrative and judicial remedies due to the sensitive nature of state tax issues. It makes no sense to undercut the Court's interpretation of federal law. Further, I believe that interests of comity[1] dictate that state courts defer to the federal framework carefully established by the United States Supreme Court, just as the federal court in *Fair Assessment* deferred to the state courts in fashioning a rule that would not disrupt a carefully fashioned state tax scheme. The majority's approach creates the anomalous result of encouraging federal claimants to flock to state courts to pursue section 1983 actions, when the precise purpose of the federal rule is to ensure that state courts may deal with the matter under state law first.

Moreover, the majority's approach virtually eliminates any opportunity for the state courts to examine the state tax scheme under the laws or Constitution of the Commonwealth. The precise concern for the sensitive nature of state tax schemes, which motivated the United States Supreme Court in *Fair Assessment*, should a *fortiori* motivate state courts to examine those schemes under state law first. The majority's approach obliterates this opportunity and, again, produces the incongruous result of creating a stronger, virtually exclusive federal forum for section 1983 claims in state court—rather than in federal court where the action should take priority.

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1. It is important to remember that comity works both ways. Judicial comity is "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

The Supreme Court's decision in *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), in no way compels the majority's result. It must be remembered that for the state courts to require exhaustion of state remedies as a prerequisite to a section 1983 action would only be to impose upon plaintiffs in state court the same requirement that would be imposed upon them in federal court. *Felder* simply prohibits the application of a state rule where the rule conflicts with the remedial objectives of section 1983 and its enforcement will "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court." 487 U.S. at 138. Ironically, the majority's refusal to impose an exhaustion requirement creates just such a situation where different outcomes will be reached in section 1983 litigation "based solely on whether the claim is asserted in state or federal court."

I believe that, in the circumstances of this case, the Court should defer to the framework established by the federal courts. Therefore, I must respectfully dissent.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

GREENWICH TOWNSHIP et al., Appellants	:	
v.	:	No. 625 C.D. 1991
MERRY J. MURTAGH et al., Appellees	:	
BOROUGH OF WYOMISSING HILLS, BOROUGH OF BIRDSBORO, BOROUGH OF WEST READING et al., Appellants	:	
v.	:	No. 771 C.D. 1991 Argued: September 11, 1991
MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH et al., Appellees	:	

BEFORE:
HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge

OPINION BY JUDGE PELLEGRINI
Filed: January 9, 1992

Greenwich Township, et al. and Borough of Wyomissing Hills, et al. (Local Governments) appeal an order of the Court of Common Pleas of Berks County, finding that the trial court has subject matter jurisdiction to a class action Section 1983 amended complaint of Merry J. Murtagh, et al. (Taxpayers), challenging the constitutionality of the manner in which property is assessed for real estate tax purposes.

Taxpayers, representing a class of recent purchasers of real property in Berks County, filed a complaint

against the County of Berks (County) and the Berks County Board of Assessment Appeals (Board), alleging that they had adopted a so-called "Welcome Stranger" policy. Taxpayers alleged that under that policy, recently purchased properties were re-assessed at fair market value, resulting in significantly higher tax assessments than those on other comparable longer-held neighboring properties which were not re-assessed under the practice. Taxpayers alleged that the County and the Board's practice violated their equal protection rights under the Fourteenth Amendment,[1] and, because the re-assessments were done under color of state law, there was a violation of 42 U.S.C. §1983.

The County and the Board filed a number of preliminary objections to Taxpayers' complaint, only one of which the trial court sustained finding that taxpayers had failed to sue the local governments who levied taxes which were indispensable parties. As a result, Taxpayers filed an amended complaint joining all taxing authorities in the County, nearly 100 cities, boroughs, townships and school districts. Many of the newly joined local government defendants again filed preliminary objections to the amended complaint based upon lack of subject matter jurisdiction. The trial court dismissed both sets of preliminary objections, but certified the issue for appeal pursuant to Pa. R.A.P. §1311(b).[2] Sub-

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1. Taxpayers rely principally on *Allegheny Pittsburgh Coal Company v. County Commissioner of Webster County*, 488 U.S. 336 (1989), where the Supreme Court overturned a West Virginia Supreme Court decision, and held that this type of "Welcome Stranger" policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Under Pa. R.A.P. 1311(b), a party may file a petition for permission to appeal to this Court when the trial court's interlocutory order contains the statement prescribed in 42 Pa. C.S. §702(b). The trial court's Order satisfied this requirement by stating that "[t]his Order is deemed to involve a controlling question of law as to which there is a substantial ground for difference of opinion. An immediate appeal from the Order may materially advance the ultimate determination of this matter."

sequently, this court granted separate petitions for permission to appeal an interlocutory order filed by Local Governments and consolidated the appeals.

Local Governments contend, as they did before the trial court, that municipalities and school districts are not proper parties to the action, because they do not have the power or authority to set policy concerning property assessments. Moreover, they now contend that the trial court does not have subject matter jurisdiction over a Section 1983 action challenging a county's tax assessment procedure because a Section 1983 action challenging a state tax scheme and seeking monetary damages is not maintainable in a state court where taxpayers have a plain, adequate and complete state remedy. Pointing out that an identical Section 1983 action challenging the County's "Welcome Strangers" policy was dismissed by a federal district court in *Sunderland Properties, Inc. v. County of Berks,* 750 F.Supp. 704 (E.D. Pa. 1990) based upon comity and the Tax Injunction Act of 1937, 28 U.S.C. §1341,[3] Local Governments argue that similarly, a state court should not entertain a Section 1983 action, enabling Taxpayers to circumvent the statutory scheme set forth in the General County Assessment Law (GCAL)[4] and the Third Class County Assessment Law (TCCAL).[5]

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3. The Tax Injunction Act of 1937 provides that:

> The district courts shall not *enjoin, suspend or restrain* the assessment, levy or collection of *any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.*

28 U.S.C. §1341. (Emphasis added.)

4. Act of May 22, 1933, P.L. 853, *as amended,* 72 P.S. §§5020-101 - 5020-602.

5. Act of June 26, 1931, P.L. 1379, *as amended,* 72 P.S. §§5342 - 5350j.2. This act does not have an official name but is commonly referred to as the Third Class County Assessment Law.

Taxpayers do not disagree that federal Courts have routinely refrained from interfering with the administration of state taxes, including the district court in *Sunderland Properties,* under the principles set forth in *Fair Assessment In Real Estate v. McNardy,* 454 U.S. 100 (1981). In *Fair Assessment,* the Supreme Court found that while the Tax Injunction Act only bars injunctive action, the principle of comity[6] bars actions for monetary damages as well. *Id.* at 180. By enacting the Tax Injunction Act, the Supreme Court stated that Congress recognized that the autonomy and fiscal stability of states survive best when their tax systems are not subject to scrutiny in federal courts. *Id.* at 102-103. The court reasoned that allowing actions for monetary damages would be just as intrusive and disruptive to the states' revenue collection system as the actions for injunctive relief specifically barred under the Tax Injunction Act. *Id.* at 114-115. It then went on to state that "[s]uch taxpayers must seek protection of their federal rights by *state remedies,* provided, of course, that those remedies are *plain, adequate, and complete,* [footnote

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6. The Supreme Court in *Fair Assessment* cited their decision in *Younger v. Harris,* 401 U.S. 37, 44-45 (1985), where they explained:

> [That] the notion of 'comity,' . . . is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways . . . [T]he concept [represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Fair Assessment, 454 U.S. at 112.

omitted][7] and may ultimately seek review of the state decisions in this court." *Id.* at 116.[8] (Emphasis added.)

Taxpayers counter, however, that the defense of comity and the prohibitions contained in the Tax Injunction Act are not defenses that are applicable in state courts. Because comity is a doctrine based upon "the need for federal court restraint", "the fundamental principle of comity between federal courts and state courts" and the "respect that should be accorded state tax laws", as well as the "question of state law . . . like other state regulatory issues are heard in state court," *Id.* at 103, 108, 109, none of those concerns expressed in *Fair Assessment* and its progeny are applicable when a cause of action is brought in the state forum. They contend that state courts present no danger of federal court interference or misunderstanding, and the abstention based upon comity simply then is inapplicable. Moreover, Taxpayers contend that the Tax Injunction Act only applies by its very terms to preclude federal courts, not state courts, from enjoining state tax schemes.

Since *Maine v. Thiboutot,* 448 U.S. 1 (1980), it has been settled that state courts have concurrent jurisdiction with federal courts to hear Section 1983 claims. Uncertainty, however, existed as to whether state courts were required to hear such claims or whether they could decline to do so when they perceived that to allow such

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7. The omitted footnote stated that the court discerned no significant difference between remedies which are "plain, adequate, and complete," as the phrase is used to articulate the doctrine of equitable constraint under comity, and those that are "plain, speedy and efficient," within the meaning of the Tax Injunction Act. *Fair Assessment,* 454 U.S. at 116 n.8.

8. Justice Brennan, speaking for three other concurring justices, would have found that the taxpayer must exhaust the available administrative remedies prior to bringing a Section 1983 suit, stating that "the requirement of exhaustion of state administrative remedies was certainly a mandatory precondition to suit and, in a sense, a 'jurisdictional pre-requisite.' " *Fair Assessment,* 454 U.S. at 137.

a suit would be contrary to state law or interest. Overturning a Florida Court of Appeal's decision declining to exercise Section 1983 jurisdiction, the Supreme Court in *Howlett v. Rose,* 110 S.Ct. 2430 (1990), in holding that there was no discretion by a state court to entertain such claims, the reverse of comity, discussed the method and enforcement of federal law in state courts.

The Court in *Howlett* explained that the "federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the state legislature." *Id.* at 2438. Expressing that state courts may not, except in rare circumstances, deny a federal right when the parties and controversy are properly before the state court, the Supreme Court found that the overriding federal interest requires that, "A state may not, by statute or common law, create a cause of action under Section 1983 . . . ", nor may a state lessen the availability of a Section 1983 action. *Id.* at 2439, 2442. The Supreme Court held that in actions brought in state courts seeking to enforce federal law, "the rights of, and the defenses to, a federal cause of action are defined by federal law." *Id.* at 2442.

The Supreme Court foreclosed the state courts from expanding or limiting the availability of a federal cause of action because Section 1983 advances federal, and not state rights and interests. By doing so, the Supreme Court, in effect, enunciated a principle that while state courts are required to entertain federal causes of actions, they should be guided by federal law to determine how federal rights are to be enforced,[9] thereby attempting to assure that the outcome of federal causes of actions

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9. Quoting from *Wilson v. Garcia,* 471 U.S. 261, 269 (1985), the Supreme Court in *Howlett* stated:

> Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.

Howlett, 110 S.Ct. at 2444.

would be the same, regardless if decided in a state or federal forum.

Other states have used this principle to determine whether a Section 1983 challenge to state administration of taxes can be maintained in state courts. In *Backus v. Chilivis,* 236 Ga. 500, 224 S.E.2d 370 (1976), the Georgia Supreme Court held that a Section 1983 claim is not available under the principles set forth under the Tax Injunction Act, stating that "[t]he overriding interests of the state in an efficient, expeditious and non-disruptive resolution of ad valorem [property] tax disputes would be severely impaired, if not destroyed, by allowance of such suits." *Id.* at __, 224 S.E.2d at 374. Echoing this reasoning, and applying *Fair Assessment,* the Supreme Court of Missouri, in *Stufflebaum v. Pantethiere,* 691 S.W.2d 271, 272 (Mo. en banc 1985), stated that "if Section 1983 could be invoked [in real estate tax cases], 'the obstruction to the collection of taxes would be so frequent as to be intolerable.' " (Citation omitted.)

Noting the absence of any language in *Fair Assessment,* indicating that state courts are required to entertain Section 1983 challenges to state taxation, the Supreme Court of North Dakota in *Linderkamp v. Bismark School District No. 1,* 397 N.W.2d 76, 79-80 (N.D. 1986), found that the Tax Injunction Act recognizes "that state taxation embraces uniquely local concerns, and that the greatest possible deference [should] be paid to state remedial schemes." *Id.* at 79. It then went on to state that "deference to state remedial schemes leads to the conclusion that a state court §1983 action . . . is no less of a burden upon the state remedial scheme than would be a Section 1983 action in federal court." *Id. See also Spencer v. South Carolina Tax Commission,* 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd mem.,* 471 U.S. 82 (1985); *Johnson v. Gaston County,* 71 N.C. App. 707, 323 S.E.2d 381, *appeal denied,* 313 N.C. 508, 329 S.E.2d 392 (1985); *Zizka v. Water Pollution Control Authority,* 195 Conn. 682, 490 A.2d 509 (1985); *Davis*

v. City of Eckhorn, 132 Wisc.2d 394, 393 N.W.2d 95 (1986); *Nutbrown v. Munn,* 311 Or. 328, 811 P.2d 131 (1990); *Hogan v. Musolf,* 471 N.W.2d 216 (Wisc. 1991); *L.L. Bean, Inc. v. Bracey,* __ S.W.2d __, 1991 WL 195305 (Tenn. No. 01501-9010-CH-00087, filed September 9, 1991).[10]

We join the consensus of other state courts that a Section 1983 challenge to state tax administration is not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief. Both Congress, by enacting the Anti-Tax Injunction Act, and the Supreme Court, by its holding in *Fair Assessment,* prohibiting or declining to exercise jurisdiction, have decided that federal interests are not advanced by allowing federal causes of action to intrude upon a carefully formulated state system designed to rectify state tax disputes. Since federal courts decline to exercise jurisdiction because federal intrusion in state tax schemes is

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10. Only two state courts have decided that a Section 1983 action can be maintained without requiring an exhaustion of state remedies. The Supreme Court of Mississippi in *Burrell v. Mississippi State Tax Commission,* 536 So.2d 848, 864 (Miss. 1988), held that their state courts must hear taxpayers' actions brought pursuant to Section 1983, because they have concurrent jurisdiction with the federal courts, and the Supremacy Clause of the United States Constitution requires that state courts enforce the valid enactments of Congress, of which Section 1983 is one. However, the court never considered the exhaustion of remedies argument advanced by the concurrence in *Fair Assessment,* but simply looked at the principle of comity espoused by the majority, finding that it did not apply to state courts. *Id.*

The Superior Court of New Jersey in *Bung's Bar & Grille, Inc. v. Florence Township,* 206 N.J. Super. 432, __ 502 A.2d 1981 1215-1216 (1985), held that their courts must entertain these actions, since New Jersey law demands that all issues of a controversy be included at the same time in a lawsuit and the available administrative remedy did not allow for civil rights claims. However, this decision is not at odds with those of the majority of other states, since the decision actually turned on the fact that this joinder requirement deprived plaintiffs of a "plain, speedy and efficient remedy." *Id.* at __, 502 A.2d at 1215.

unwarranted, state courts should also not interfere, because its enforcement of Section 1983 is no less intrusive or disruptive than if enforced by a federal court.[11]

Because a Pennsylvania court has not addressed this issue, we must now determine whether the established administrative remedy provides Taxpayers with a "plain, adequate, and complete" remedy. The existing administrative procedures applicable to a taxpayer's appeal of a property assessment in Berks County can be found in the General County Assessment Law and the Third Class County Assessment Law.

The Third Class County Assessment Law creates a three-member Board of Assessment Appeals (Board) in each county which must cause annual assessment of property within its jurisdiction. Sections 1 and 3 of the TCCAL; 72 P.S. §§5342, 5344. Property owners subject to these assessments must be duly notified. Section 8(b) of the TCCAL; 72 P.S. §5349(b). A property owner who is aggrieved by any assessment, whether or not the assessment has been changed from the previous year,

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11. Taxpayers also rely on the recent U.S. Supreme Court opinion in *Dennis v. Higgins*, 59 U.S.L.W. 4117 (1991). *Dennis* held that a taxpayer's claim brought in a Nebraska state court that a state tax discriminates against non-residents in violation of the Commerce Clause is actionable under Section 1983. Taxpayers point to the language in the dissenting opinion which states: "[t]oday's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers." *Id.* at 4124. (Kennedy, J. dissenting.) The dissenting opinion, alluding to the Tax Injunction Act, and the court's opinion in *Fair Assessment* and the state supreme court cases of *Backus* and *Spencer*, stated that the questions regarding jurisdiction of the state courts over tax actions "now become of paramount importance, as we risk the destruction of state fiscal integrity in a manner which may require congressional correction." *Id.* Because the majority in *Dennis* never discusses whether the state court had subject matter jurisdiction or whether there was a full and complete remedy at state law, apparently because those issues were not raised and because of the unique procedural history of that case, it has no impact on our decision.

has a right to appeal to the Board for relief. Section 8(c) of the TCCAL; 72 P.S. §5349(c). When such an appeal has been filed, the Board must notify each person and each taxing district which has an interest and has the power to compel the attendance of witnesses and the furnishing of documents. Section 8(d) of the TCCAL; 72 P.S. §5349(d).

Section 9 of the Third Class County Assessment Law further provides that the aggrieved property owner may appeal the final decision of the Board to the county court of common pleas. 72 P.S. §5350. The court of common pleas will proceed de novo. *Appeal of U.S Steel Corporation,* 436 Pa. 435, 260 A.2d 779 (1970); *Valley Forge Golf Club, Inc. v. Board of Assessment and Revision of Taxes of Montgomery County,* 3 Pa. Commonwealth Ct. 644, 285 A.2d 213 (1971).

The General County Assessment Law also applies to Berks County, where it is not inconsistent with the Third Class County Assessment Act. Art. I, §105 of the GCAL; 72 P.S. §5020-105; *Truck Terminal Motels of America, Inc, v. Berks County Board of Assessment Appeals,* 127 Pa. Commonwealth Ct. 408, 561 A.2d 1305 (1989) *petition for allowance of appeal denied,* 525 Pa. 625, 581 A.2d 576 (1990). The General County Assessment Law provides that the Board in each county shall hear property owners' appeals of tax assessments. Art. V, §511 of the GCAL; 72 P.S. §5020-511. The decision of the Board can then be appealed to a court of common pleas for a de novo proceeding, with further appeals to the Superior and Supreme Courts. Art. V, §§518.1, 518.2, and 519 of the GCAL; 72 P.S. §§5020-518.1-2, 5020-519.

The federal courts in Pennsylvania have already addressed the issue of whether the General and Third Class County Assessment Laws provide a taxpayer a plain, adequate, and complete remedy.[12] In *Garrett v.*

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12. The Pennsylvania courts are not bound by the decisions of the federal courts, except those of the United States Supreme

Bamford, 582 F.2d 810 (3rd Cir. 1978), the United States Court of Appeals for the Third Circuit held that the district court properly abstained from entertaining a Section 1983 class action challenging alleged discriminatory property tax assessments brought by property owners in Berks County. The Third Circuit held that the class action was precluded in federal court under the Tax Injunction Act, since the Third Class County Assessment Law, affording administrative appeal with judicial review to a class, provided them with a plain, speedy and efficient remedy. *Id.* at 819.

The Third Circuit in *Garrett* went on to state that the property owner's allegation that the assessments were not uniform and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution could be asserted under Article VIII, §1 of the Pennsylvania Constitution[13] and addressed by the Board and by the court of common pleas at the de novo proceeding. The court, citing *Buhl Foundation v. Board of Property Assessment,* 407 Pa. 567, 570, 180 A.2d 900, 902 (1962), stated that it is the Board's and the Court of Common Pleas' duty to determine the value of the property, and between the standard of actual value and the standard of uniformity, uniformity must prevail. *Garrett,* 582 F.2d at 816. Therefore, the court reasoned, an action pursuant to Section 1983 would not afford the taxpayer any more relief than he would receive under Pennsylvania law. *Id.* at 817.

NOTES *(Continued)*

Court. *See Department of Environmental Resources v. City of Harrisburg,* 133 Pa. Commonwealth Ct. 577, 578 A.2d 563 (1990); *Cianfrani v. Johns-Manville Corp.,* 334 Pa. Superior Ct. 1, 482 A.2d 1049 (1984).

13. This Article of the Pennsylvania Constitution provides that:

> All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Pa. Const. art. VII, §1.

Moreover, as previously mentioned in a recent case involving the exact same allegations concerning the so-called "Welcome Stranger" policy in Berks County, the United States District Court for the Eastern District of Pennsylvania ruled that the principle of comity relied on by the majority in *Fair Assessment* barred the taxpayer's action in federal court. *Sunderland Properties, Inc. v. County of Berks,* 750 F.Supp. 704, 710. The court in *Sunderland* further stated that the principle of comity would bar the action only if the plaintiff was provided a "plain, adequate and complete" remedy under state law. *Id.* at 707.

In determining whether the plaintiff's remedy was plain, adequate and complete, the *Sunderland* court stated that:

> A plaintiff's state remedy is plain, speedy and efficient if it provides the taxpayer with a *full hearing and Judicial determination at which the taxpayer may raise federal constitutional objections.* Rosewell v. LaSalle National Bank, 450 U.S. 503, 514 (1981). . . . The state remedy that will suffice need only be adequate, and need not be coextensive with the remedies in federal court. In other words, the state remedy that will meet the requirement of plain, speedy and efficient need not be the best or most convenient one.

Id. at 707. (Citations omitted.) (Emphasis added.)

The District Court found the remedy to be plain, adequate and complete, since the General County Assessment Law, specifically 42 P.S. §§5020-518.1, gave the court of common pleas broad powers to grant appropriate relief, which would include the consideration of constitutional issues. *Id.* at 708-710. The court found nothing in the procedures provided under the General and Third Class County Assessment Laws which would prevent plaintiffs from raising their constitutional issues. *Id.* at 708.

The consideration of constitutional issues by the Board and the Court of Common Pleas in tax assessment

cases is also well recognized by the Pennsylvania courts. *See Borough of Greentree v. Board of Property Assessments,* 459 Pa. 262, 328 A.2d 819 (1974); *McKnight Shopping Center, Inc. v. Board of Property Assessment,* 417 Pa. 234, 209 A.2d 389 (1965); *Consolidated Gas Supply Corporation v. County of Clinton,* 80 Pa. Commonwealth Ct. 10, 470 A.2d 1113 (1984); *Concerned Taxpayers of Beaver County v. Beaver County Board of Assessment Appeals,* 75 Pa. Commonwealth Ct. 443, 462 A.2d 347 (1983).

Since Taxpayers may raise their constitutional contentions through an exhaustion of the existing administrative procedures, we also hold that the General and Third Class County Assessment Laws provide Taxpayers with a plain, adequate and complete remedy. The statutory procedures provide a full hearing before the Board, followed by a de novo judicial determination of the Board's decision by the court of common pleas. Taxpayers may properly raise their constitutional issues before the Board and before the trial court on appeal. Taxpayers present action circumvents the established administrative procedures for reviewing a tax assessment and should be dismissed.[14]

Accordingly, we will reverse the order of the trial court and remand with instructions to dismiss the entire action for lack of subject matter jurisdiction.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

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14. Due to our resolution of this case on this issue, we need not address Local Governments' contentions contained in their appeal at 625 C.D. 1991.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

GREENWICH TOWNSHIP et al.,	:	
Appellants	:	
	:	
v.	:	No. 625 C.D. 1991
	:	
MERRY J. MURTAGH et al.,	:	
Appellees	:	
BOROUGH OF WYOMISSING HILLS,	:	
BOROUGH OF BIRDSBORO,	:	
BOROUGH OF WEST READING et al.,	:	
Appellants	:	
	:	
v.	:	No. 771 C.D. 1991
	:	
MERRY J. MURTAGH, SPENCER LEE	:	
CHERASHORE, FREDERICK	:	
MURTAGH et al.,	:	
Appellees	:	

ORDER

AND NOW, this 9th day of January, 1992, the order of the Berks County Court of Common Pleas dated January 23, 1991, is reversed and remanded with instructions to dismiss the entire action for lack of subject matter jurisdiction.

Jurisdiction relinquished.

/s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

GREENWICH TOWNSHIP et al., Appellants	:	
v.	:	No. 625 C.D. 1991
MERRY J. MURTAGH et al., Appellees	:	
BOROUGH OF WYOMISSING HILLS, BOROUGH OF BIRDSBORO, BOROUGH OF WEST READING et al., Appellants	:	
v.	:	No. 771 C.D. 1991
	:	Argued: September 11, 1991
MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH et al., Appellees	:	

BEFORE:
HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge

DISSENTING OPINION BY JUDGE SMITH
Filed: January 9, 1992

I disagree that the taxpayers present action should be dismissed for failure to exhaust administrative procedures. Since taxpayers claim Section 1983 violations as a result of the County and Board's practice, they need not exhaust administrative remedies to pursue their claims. *See Felder v. Casey,* 487 U.S. 131 (1988) (exhaustion of administrative remedy not required where Section 1983 claim brought in state, as well as federal, forum). Also, *see Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982), and this Court's holding in *City of*

Lancaster v. County of Lancaster, __ Pa. Commonwealth Ct. __, __ A.2d __ (No. 2171 C.D. 1990, filed November 15, 1991). Thus, the Court of Common Pleas of Berks County properly determined that it had subject matter jurisdiction in this case.

/s/ Doris A. Smith
DORIS A. SMITH, JUDGE

IN THE
COURT OF COMMON PLEAS
OF BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

MERRY J. MURTAGH	:	NO. 5182-89
	:	
vs.	:	
	:	
COUNTY OF BERKS, *et al.*	:	

ORDER

SUR: Preliminary Objections of Certain Defendants to the Amended Complaint

AND NOW, this 3rd day of December, 1990, after a review of the several briefs of the Defendants in support of the issues raised on their Preliminary Objections which are collectively set forth as follows:

1. Whether Plaintiffs' have stated a cause of action against the Defendant municipalities and school districts for their taxing policies which allegedly violate the Plaintiff's civil rights under 42 U.S.C. §1983;

2. Whether the Plaintiffs claims are barred by the doctrine of sovereign immunity;

3. Whether the plaintiffs can maintain this action because they have not exhausted other judicial or administrative remedies,

4. Whether Plaintiffs were required to give notice pursuant to 42 Pa. C.S.A. 5522,

5. Whether the State Tax Equalization Board and the Tax Collectors are necessary and indispensable parties,

6. Whether Plaintiffs have complied with Pa. R.C. P.:

(a) 422,
(b) 1018,
(c) 1019, and
(d) 1020 (a) and (b)(1),

7. Whether Plaintiffs claims are barred by the Statute of Limitations,

8. Whether this case can be maintained as a class action,

9. Whether each representative plaintiff has to asset a claim against each defendant,

10. Whether the Plaintiffs who purchased realty three (3) years ago can adequately represent the proposed class.

11. Whether Plaintiffs may maintain this case as a class action because a class is not aggrieved and because of 72 P. S. 5566(b),

12. Whether Plaintiffs may maintain this case as a class action because Plaintiffs purportedly seek a fluid class recovery,

and,

After oral argument in Open Court on Monday, October 8, 1990, the court deems it unnecessary to answer each objection individually since each objection is overruled and all Preliminary Objections are dismissed.

The several Defendants are granted twenty (20) days from the date of this order in which to file responsive pleadings to the Complaint.

BY THE COURT.

/s/ Horace A. Davenport
Senior Judge
38th Judicial District
Specially Presiding

Extract from the record of said Court
Certified this 23rd day of January 1991
THOMAS W. GAJEWSKI Prothonotary
Karen A. Wilson Deputy

IN THE
SUPREME COURT OF PENNSYLVANIA

NO. 0034 M.D. APPEAL DOCKET 1992

MERRY J. MURTAGH, *et al.*,
Appellants,

v.

GREENWICH TOWNSHIP, *et al.*,
Appellees

MERRY J. MURTAGH, *et al.*,
Appellants,

v.

BOROUGH OF WYOMISSING HILLS, *et al.*,
Appellees

APPEAL FROM THE JUDGMENT AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA ENTERED JANUARY 9, 1992 AT DOCKET NOS. 625 C.D. 1991 AND 771 C.D. 1991 REVERSING THE INTERLOCUTORY ORDER OF THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA, ENTERED JANUARY 23, 1991 AND AMENDED MARCH 6, 1991, IN CIVIL ACTION NO. 5182-89 A.D.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
THE ORDER IN QUESTION	1
QUESTION PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. State Pre-emption of the Adjudication of A Core Federal Cause of Action Violates the Supremacy Clause of the United States Constitution	8
II. A State Court May Not Constitutionally Eliminate the Exercise of a Federal Right	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

423 South Salina St. v. City of Syracuse, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied,* 481 U.S. 1008 (1987) 11

Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989) 2, 3, 12

American Trucking Associations, Inc. v. Secretary of State, 595 A.2d 1014 (Me. 1991) 11

Arkansas Writers' Project, Inc. v. Ragland, 293 Ark. 395, 738 S.W.2d 402 (1987) 11

Balshy v. Rank, 507 Pa. 384, 490 A.2d 415 (1985) 7, 11

Beverly Bank v. Board of Review, 117 Ill. App. 3d 565, 453 N.E.2d 96 (1983), *cert. denied,* 466 U.S. 951 (1984) 11

Brooks v. Nance, 801 F.2d 1237 (10th Cir. 1986) . 10

Brower v. Wells, 103 Wash. 2d 96, 690 P.2d 1144 (1984) (en banc) 11

Bung's Bar Grille, Inc. v. Township Council, 206 N.J. Super. 432, 502 A.2d 1198 (Law Div. 1985) 10

Burrell v. Mississippi State Tax Comm'n, 536 So.2d 848 (Miss. 1988) (en banc) 9, 10

Burris v. Little Rock, 941 F.2d 717 (8th Cir. 1991) 10

City of Lancaster v. County of Lancaster, — Pa. Commw. —, 599 A.2d 289 (1991), *appeal denied,* — Pa. —, 606 A.2d 903 (1992) 6

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 9

Claflin v. Houseman, 93 U.S. (3 Otto) 130 (1876). 9

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Dennis v. Higgins, 498 U.S. –, 112 L.Ed.2d 969 (1991) 10, 12, 13

Department of Treasury v. Campbell, 161 Mich. App. 526, 411 N.W.2d 722 (1986) 11

Dixon v. State of Florida, 388 F.2d 424 (5th Cir. 1968) 17

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 15

Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100 (1981) 14, 15

Fawber v. Cohen, 516 Pa. 352, 532 A.2d 429 (1987)..... 7, 12

Felder v. Casey, 487 U.S. 131 (1988) 6, 9, 13

Harlan Sprague Dawley, Inc. v. Indiana Department of State Revenue, 583 N.E.2d 214 (Ind. Tax Ct. 1991)..... 11, 13

Holden Arboretum v. City of Kirtland, 19 Ohio App. 3d 1125, 483 N.E.2d 167 (1984)..... 11

Howlett v. Rose, 469 U.S. –, 110 L.Ed.2d 332 (1990) 9

Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428 (2d Cir. 1989)..... 10

Miller v. City of Los Angeles, 755 F.2d 1390 (9th Cir.) *cert. denied,* 474 U.S. 995 (1985) 10

Minneapolis & St. Louis Railroad Co. v. Bombolis, 214 U.S. 211 (1916)..... 9

Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912) 9

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds,* 436 U.S. 658 (1978) 13

Nordlinger v. Hahn, -- U.S. –, 112 S.Ct. 2326 (1992) 3

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 6, 13

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 9

Porter v. Treasurer & Collector of Taxes, 385 Mass. 335, 431 N.E.2d 934 (1982) 11

Satellink of Chicago, Inc. v. City of Chicago, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988) 11

Testa v. Katt, 330 U.S. 386 (1947) 9

Town of Eclectic v. Mays, 547 So.2d 96 (Ala. 1989) 11

Uretsky v. Baschen, 47 Ill. App. 3d 169, 361 N.E.2d 875 (1977) 11

Wareham v. Jeffes, 129 Pa. Commw. 124, 564 A.2d 1314 (1989) 7, 12

United States Constitution:

U.S. Const. art. VI, cl.2 ..... 8 and passim

Pennsylvania Constitution:

Pa. Const. art. VIII, §1 2

Pa. Const. art. VI, §3 8

Statutes:

28 U.S.C. §1341 14

42 U.S.C. §1983 ..... passim

42 Pa.C.S. §724 1

TABLE OF AUTHORITIES – *(Continued)*

Statutes: Page

42 Pa.C.S. §5105(a) 1

72 Pa.C.S. §5020-101 *et. seq* 2

72 Pa.C.S. §5342 *et. seq* 2

Rules of Civil and Appellate Procedure

Pa. R. App. P. 1112 1

Legislative Materials

S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937) 14, 15

Treatises

Note, *Clarifying Comity: State Court Jurisdiction And Section 1983 State Tax Challenges,* 103 Harv.L. Rev. 1888 (1990) 11

STATEMENT OF JURISDICTION

Jurisdiction of this Court is based upon 42 Pa.C.S. 5105(a), 42 Pa.C.S. §724 and Rule 1112 of the Pennsylvania Rules of Appellate Procedure.

THE ORDER IN QUESTION

The Order dated January 9, 1992 reads as follows:

AND NOW, this 9th day of January, 1992, the order of the Berks County Court of Common Pleas dated January 23, 1991, is reversed and remanded with instructions to dismiss the entire action for lack of subject matter jurisdiction.

Jurisdiction relinquished.

_____

DAN PELLEGRINI, JUDGE

QUESTION PRESENTED FOR REVIEW

Whether the Commonwealth Court erred in willfully disobeying the command of the Supremacy Clause of the United States Constitution by directing dismissal of this § 1983 action alleging the unconstitutionality of defendants' "Welcome Stranger" policy?

STATEMENT OF THE CASE

The Constitution and statutes of the Commonwealth of Pennsylvania embody a "current value" system of taxation that requires property to be taxed at a uniform rate according to its estimated actual market value. *See* Pa. Const. art. VIII, § 1; 72 Pa.C.S. §§ 5020-101 *et. seq.* and 5342 *et. seq.*[1]

The instant action is an attack by taxpayers of Berks County, through representative plaintiffs, seeking damages as a result of defendants' "Welcome Stranger" policy. Pursuant to the "Welcome Stranger" policy, newly acquired properties were reassessed and taxed strictly at fair market value, represented by the actual selling price, resulting in significantly higher assessments and taxes than assessments and taxes of comparable longer-held properties. In 1989, in *Allegheny Pittsburgh Coal Co. v. County Commission,* 488 U.S. 336 (1989), the United States Supreme Court held that the *de facto* discrimination engendered by a "Welcome Stranger" policy in a "current value" taxation system violates the Equal Protection Clause of the United States Constitution.[2]

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1. Pennsylvania's system of taxation is in direct contrast to an "acquisition value" system of taxation that assesses values related to the value of the property at the time it is acquired by a taxpayer. The best known example of an "acquisition value" system of taxation is California's Proposition 13, which added Article XIII A to California's Constitution.

2. In *Nordlinger v. Hahn,* — U.S. —, 112 S.Ct. 2326 (1992) the United States Supreme Court, while upholding California's Proposition 13 against an equal protection challenge, distinguished

Plaintiffs are recent purchasers of real property in Berks County. They commenced this class action after exhausting their state administrative remedies. (Amended Complaint ¶124, R 42a) The plaintiff class is defined as property owners who purchased real property in Berks County since January 1, 1980. The period for which damages are sought is 1987 to the present. The initial defendants were Berks County and the Berks County Board of Assessment Appeals. Following the Court of Common Pleas' Order finding a failure to join indispensable parties, plaintiffs filed an Amended Complaint joining all taxing authorities (cities, boroughs, townships and school districts) in Berks County. The Amended Complaint states a single federal cause of action under 42 U.S.C § 1983 and alleges that all defendants violated plaintiffs' right to equal protection of the law in their assessment and taxation of real property. (Amended Complaint ¶¶1 and 132, R 21a and 44a)

The vast majority of real property in Berks County has not changed ownership in many years and has not been subject to any re-evaluation of fair market value for purposes of real estate taxation. (Amended Complaint ¶117, R 41a) Defendants' long-standing custom and practice, with minor exception, was to reassess for property tax purposes only those parcels which changed ownership for fair market value. (Amended Complaint ¶118, R 41a) Berks County has never had a county-wide tax reassessment. (Amended Complaint ¶115, R 40a) As

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NOTES *(Continued)*

Allegheny Pittsburgh on the grounds that there is no equal protection violation when the state adopts an "acquisition value" system of taxation by state law or state constitutional amendment. The holding in *Nordlinger* in no way undercuts the Supreme Court's holding in *Allegheny Pittsburgh*; in fact, it supports it. Eight Justices reaffirmed the holding in *Allegheny Pittsburgh* that *de facto* discrimination engendered by a tax assessor's assessment practices which is contrary to a state law requiring uniformity of taxation of property violates the equal protection clause of the United States Constitution. The lone jurist adopting a contrary position was Justice Thomas.

a result of the steadily increasing value of real estate in Berks County, there exists a tremendous disparity among property assessments – and therefore taxes levied and paid – between long term residents and relatively new residents.

Defendant Berks County Board of Assessment Appeals is statutorily charged with assessing all real property in Berks County on behalf of the defendant taxing authorities. (Amended Complaint ¶119, R 41a) The taxing authorities receive the assessments from the Board of Assessment Appeals. They then decide whether or not to use the assessments or appeal them. As alleged here, the taxing authorities had a long-standing custom and practice of using the discriminatory assessments, and levying and collecting taxes thereon from plaintiffs. In short, under federal and state precedent the scheme for taxing real property in Berks County is indefensible and the deprivation to more recent property purchasers is profound and continuing.

By Order entered January 23, 1991 and Opinion dated May 22, 1991 the Court of Common Pleas of Berks County, Judge Davenport, specially presiding, dismissed the taxing authorities' preliminary objections in the nature of a demurrer. Judge Davenport held that the Amended Complaint stated a cause of action against the taxing authorities under § 1983. (See Exhibit "B", attached hereto.) The Court of Common Pleas found that the taxing authorities could be liable for an unlawful assessment practice that was delegated to the Board of Assessment Appeals. Since the harm of assessment and levying of taxes was indivisible and the taxing authorities directly benefitted from the collection of taxes, there was no ground, the court reasoned, for permitting them to avoid liability.

After their preliminary objections were overruled, certain defendants requested the trial court to amend its December 3, 1990 Order to permit them to file a petition for permission to appeal. The Court of Common Pleas,

on March 6, 1991, granted said motion and amended its order to add the following paragraph:

> This Order is deemed to involve a controlling question of law as to which there is a substantial ground for difference of opinion. An immediate appeal from the Order may materially advance the ultimate determination of this matter.

Following the amendment of the Court of Common Pleas' December 3, 1990 Order, defendants filed petitions for permission to appeal to the Commonwealth Court. By Orders dated April 9, 1991 and April 22, 1991, the Commonwealth Court granted defendants' petitions and consolidated their appeals.

In its brief filed with the Commonwealth Court, one group of defendants raised, for the first time, the issue of whether the state courts had subject matter jurisdiction over this § 1983 claim. Specifically, these defendants argued that state courts should refuse to adjudicate this § 1983 action under the doctrine of comity.

Judge Pelligrini, writing for a majority of the judges of the Commonwealth Court, held that this § 1983 action was not maintainable in state court since the state remedies afforded plaintiffs an opportunity for full and adequate relief. (See Exhibit "A", attached hereto) Finding that the "present action circumvents the established administrative procedures for reviewing a tax assessment" (i.e., a full hearing before a three-member Board of Assessment Appeals (the "Board") followed by a de novo judicial determination of the Board's decision by the Court of Common Pleas), the Commonwealth Court reversed the case with instructions to dismiss the entire action for lack of subject matter jurisdiction.

The Honorable Doris A. Smith dissented on the basis of the decisions of the United States Supreme Court in *Felder v. Casey,* 487 U.S. 131 (1988) and *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982) and the recent decision of the Commonwealth Court in *City of Lancaster v. County of Lancaster,* — Pa. Commw. —,

599 A.2d 289 (1991), *appeal denied,* – Pa. –, 606 A.2d 903 (1992). Judge Smith observed that exhaustion of administrative remedies is not required whether a § 1983 claim is brought in a state or a federal forum. Thus, she concluded that the Court of Common Pleas properly possessed subject matter jurisdiction over this case. (See Exhibit "A", attached hereto)

On February 10, 1992 plaintiffs petitioned this Court for permission to appeal the Commonwealth Court's decision. The Petition for Allowance of Appeal was granted April 20, 1992. (R47a)

SUMMARY OF ARGUMENT

The courts of Pennsylvania regularly adjudicate federal causes of action arising under § 1983 and rely on federal case law in making adjudications. *See e.g., Fawber v. Cohen,* 516 Pa. 352, 532 A.2d 429 (1987); *Balshy v. Rank,* 507 Pa. 384, 490 A.2d 415 (1985); *Wareham v. Jeffes,* 129 Pa. Commw. 124, 564 A.2d 1314 (1989). In this case, the Commonwealth Court has carved out an exception to state court adjudication of § 1983 causes of action by ruling that the courts of this state lack subject matter jurisdiction over § 1983 cases alleging the unconstitutionality of local property tax assessment and collection practices. In effect, the court ruled that state administrative and statutory procedures pre-empt this important federal statute. This ruling is directly contrary to the Supremacy Clause of the United States Constitution and decisions of the United States Supreme Court and should thus be reversed.

ARGUMENT

I. State Pre-emption of the Adjudication of A Core Federal Cause of Action Violates the Supremacy Clause of the United States Constitution

The crux of the Commonwealth Court's opinion is that "a § 1983 challenge to state tax administration is

not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief." By holding that state law pre-empts and forecloses resort to a core federal right, the decision directly contravenes the Supremacy clause of the United States Constitution and the decisions of the United States Supreme Court.

At the heart of federalism lies the prescription that state law is subservient to federal law. As expressed in Article VI of the United States Constitution (the "Supremacy Clause"):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause is specifically addressed to state court judges and even requires that they swear to uphold it in their oaths of office. *See* Pa. Const. art. VI, § 3.

"The United States Supreme Court has recognized time and time again that state courts have the duty to enforce federally created rights." *Burrell v. Mississippi State Tax Comm'n,* ____Miss. ____, 536 So.2d 848, 863 (Miss. 1988) (en banc) *citing Claflin v. Houseman,* 93 U.S. (3 Otto) 130, 136-37 (1876); *Mondou v. New York, N.H & H.R. Co.,* 223 U.S. 1, 55-58 (1912); *Testa v. Katt,* 330 U.S. 386, 389-91 (1947); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 507 (1962). A state court may not refuse to enforce a right arising under a federal statute because it disagrees with that statute or questions the wisdom of Congress in the enactment of that statute. *Minneapolis & St. Louis Railroad Co. v. Bombolis,* 241 U.S. 211, 222 (1916).

Section 1983 is a core right of citizens to be free from governmental oppression. *Felder v. Casey,* 487

U.S. 131, 139 (1988). The United States Supreme Court has held that state courts have concurrent jurisdiction over § 1983 claims and *must* adjudicate them when requested. *Howlett v. Rose,* 469 U.S. –, 110 L.Ed.2d 332 (1990). Under the Supremacy Clause, The existence of jurisdiction creates the duty to exercise it. This is so whether the civil rights claim is for police brutality or a discriminatory taxation scheme. Only eight years ago in a case involving Pennsylvania litigants, the United States Supreme Court declared:

> Challenges to the validity of state tax systems under 42 U.S. § 1983 . . . must be brought in state court.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 122 (1984). Since then, four federal courts of appeals have reiterated this: *Burris v. Little Rock,* 941 F.2d 717, 721 (8th Cir. 1991) (Section 1983 action challenging property assessments may be brought in state court); *Long Island Lighting Co. v. Town of Brookhaven,* 889 F.2d 428 (2d Cir. 1989) (Section 1983 action may be brought in the state courts of New York attacking the constitutionality of the application of a state tax scheme); *Brooks v. Nance,* 801 F.2d 1237 (10th Cir. 1986) (Section 1983 claim may be brought in the state courts of Oklahoma to attack the constitutionality of the application of a state tax scheme); *Miller v. City of Los Angeles,* 755 F.2d 1390 (9th Cir.), *cert. denied,* 474 U.S. 995 (1985) (Section 1983 claim may be brought in state courts of California to attack the constitutionality of the application of a state tax scheme).

Only last year the United States Supreme Court reversed a Nebraska state court which refused to adjudicate a § 1983 attack on the constitutionality of a state tax that favored residents over non-residents. *Dennis v. Higgins,* 498 U.S. –, 112 L.Ed.2d 969 (1991). Although the Supreme Court was presented with the same state cases and line of reasoning the Commonwealth Court found so compelling here, no member of the Supreme Court adopted that position. And, as the Commonwealth

Court observed, at least two states have ruled contrary to the Commonwealth Court. *See Burrell v. Mississippi State Tax Comm'n,* 536 So.2d 848 (Miss. 1988) (en banc); *Bung's Bar Grille, Inc. v. Township Council,* 206 N.J. Super. 432, 502 A-2d 1198 (Law Div. 1985); *see also Harlan Sprague Dawley, Inc. v. Indiana Department of State Revenue,* 583 N.E.2d 214 (Ind. Tax Ct. 1991); *Beverly Bank v. Board of Review,* 117 Ill. App. 3d. 565, 453 N.E.2d 96 (1983), *cert. denied,* 466 U.S. 951 (1984); Note, *Clarifying Comity: State Court Jurisdiction And Section 1983 State Tax Challenges,* 103 Harv. L. Rev. 1888 (1990). The Commonwealth Court, however, neglected to point out that a host of other states regularly adjudicate § 1983 state tax damage claims. *See American Trucking Associations, Inc. v. Secretary of State,* 595 A.2d 1014 (Me. 1991); *Town of Eclectic v. Mays,* 547 So.2d 96 (Ala. 1989); *Arkansas Writers' Project, Inc. v. Ragland,* 293 Ark. 395, 738 S.W.2d 402 (1987); *Satellink of Chicago, Inc. v. City of Chicago,* 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988); *Uretsky v. Baschen,* 47 Ill. App. 3d 169, 361 N.E.2d 875 (1977); *Porter v. Treasurer & Collector of Taxes,* 385 Mass. 335, 431 N.E.2d 934 (1982); *Department of Treasury v. Campbell,* 161 Mich. App. 526, 411 N.W.2d 722 (1986); *423 South Salina St. v. City of Syracuse,* 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied,* 481 U.S. 1008 (1987); *Holden Arboretum v. City of Kirtland,* 19 Ohio App. 3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells,* 103 Wash. 2d 96, 690 P.2d 1144 (1984)(en banc).

There is no constitutional basis for the Commonwealth Court to distinguish between the adjudication of challenges to state taxation schemes and other types of governmental deprivation of rights. Pennsylvania courts regularly adjudicate § 1983 actions and rely on federal case law in making such adjudications. *See e.g., Fawber v. Cohen,* 516 Pa. 352, 532 A.2d 429 (1987); *Balshy v. Rank,* 507 Pa. 384, 490 A.2d 415 (1985); *Wareham v. Jeffes,* 129 Pa. Commw. 124, 564 A.2d 1314 (1989).

Plaintiffs here were discriminated against under a "Welcome Stranger" policy, the same type of policy that was declared violative of the United States Constitution in *Allegheny Pittsburgh Coal Co. v. Country Commission,* 488 U.S. 336 (1989). As new property owners in Berks County, they were like the non-residents discriminated against in *Dennis v. Higgins.*

The Commonwealth Court's justification for distinguishing illegal state taxation schemes from other forms of governmental misconduct is that enforcement in the former context would be "intrusive and disruptive." Of course, every § 1983 action is intrusive since it shines a public spotlight on the misdoings of state bureaucrats; this is no more or less the case with Berks County taxing authorities' sordid practices. Likewise, there is certainly no basis for distinguishing the § 1983 action here on the ground it would be disruptive. At issue is an indefensible and unconstitutional policy that bilked new residents out of millions of dollars. This lawsuit is certainly less disruptive to the taxing authorities than if tens of thousands of Berks County taxpayers filed suit individually under the arcane, costly and inefficient methods available under state law.

The Commonwealth Court's holding, saying in effect, that state law preempts federal law stands both logic and the United States Constitution on their heads. Federal law is supreme to state law, not the other way around. The refusal of the Commonwealth Court to adjudicate this § 1983 action is directly contrary to the commands of the Supremacy Clause.

II. A State Court May Not Constitutionally Eliminate The Exercise of a Federal Right

Contrary to well-established Supreme Court precedent, the Commonwealth Court precluded Pennsylvania taxpayers from ever exercising their federal right to sue

under § 1983. This decision goes well beyond established law that a plaintiff need not exhaust state administrative or judicial remedies before suing under § 1983, *Patsy v. Board of Regents of Florida,* 457 U.S. 496 (1982); *Monroe v. Pape,* 365 U.S. 167 (1961), *overruled on other grounds,* 436 U.S. 658 (1978) and that a state may not impose on a § 1983 litigant pre-suit requirements that are not present under federal law. *Felder v. Casey,* 487 U.S. at 141, 144-45. Under the holding of the Commonwealth Court a taxpayer could not sue under § 1983 even if he had exhausted state administrative and judicial remedies. Furthermore, § 1983 provides a more adequate remedy to plaintiffs than state law since successful plaintiffs may recover their attorneys fees under § 1988. *Dennis v. Higgins,* 112 L.Ed.2d at 989 (Kennedy, J. dissenting); *Harlan Sprague Dawley, Inc. v. Indiana Department of State Revenue,* 583 N.E.2d 214, 222 Ind. Tax Ct. 1991) (noting that state tax remedies that do not provide for award of attorneys' fees do not offer adequate remedies to redress federal constitutional harm).

There is nothing in the language or legislative history of the Federal Tax Injunction Act, 28 U.S.C. § 1341, which supports the termination of taxpayers rights to sue under § 1983. By its express terms, the Tax Injunction Act does no more than require federal courts to defer to state courts in actions seeking equitable relief; it says nothing about limiting the duties of state courts to enforce federal rights. Although the Supreme Court in *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100 (1981) extended federal court deference, under the concept of comity, to damage actions, there is nothing in *McNary* that even suggests that a state court may deny or burden a litigant from asserting a violation of his civil rights in state court. In fact, it would be logically inconsistent to require taxpayers to bring § 1983 tax actions in state court and then to hold that the Tax Injunction Act effectively forecloses such actions.

The legislative history of the Tax Injunction Act further confirms that it was not intended to limit taxpayers to remedies provided by state law. The Senate Report on § 1341 described it as simply amending the "Judicial Code . . . with respect to the jurisdiction of the district courts . . . over suits relating to the collection of state taxes." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). Senator Bone, who introduced the Tax Injunction Act, called it "a very short bill" designed to alter "the jurisdiction of district courts." 81 Cong. Rec. 1415 (1937). He emphasized that "the bill [did] not take away any equitable right of a taxpayer, or deprive him of a day in court." *Id.* at 1416. The Act passed with little debate. There is no evidence that Congress believed it was doing anything more than limiting the jurisdiction of federal courts.

To accomplish its purpose, Congress did not have to do anything more than remove federal court equitable jurisdiction over state tax matters. Prior to the enactment of the Tax Injunction Act, federal courts had become "free and easy with injunctions,"[3] in tax cases for two reasons. First, the Eleventh Amendment often prevented federal courts from providing a remedy at law thus justifying the issuance of federal court injunctions not available in state courts; second, the federal courts had failed to apply strictly the principle of comity that otherwise limited federal court jurisdiction.[4] The problem was complicated further because foreign corporations through diversity jurisdiction were able to secure more favorable remedies in federal courts than were available to citizens of a state in that state's courts. S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). In the

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3. *McNary,* 454 U.S. at 129 (Brennan J., concurring) *(quoting England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 431 (1964)(Douglas, J., concurring)).

4. *McNary,* 454 U.S. at 129 n.15, 130 (Brennan, J., concurring) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937) and 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone)).

Tax Injunction Act, Congress responded to these concerns simply by precluding federal courts from enjoining the collection of state taxes. Solving these problems did not require Congress to alter state court jurisdiction over federal claims, and Congress did not do so.

CONCLUSION

Courts of this Commonwealth are required by the Supremacy Clause of the United States Constitution to adjudicate this § 1983 action. State pre-emption of a federal cause of action is directly contrary to the Constitution and decisions of the United States Supreme Court. Moreover, a refusal by a state court to adjudicate this § 1983 case will force a federal court to adjudicate it. Under *McNary* federal courts merely deferred to state courts under the doctrine of comity. Comity is defeated and undermined where, as here, the state court refuses to adjudicate the cause of action. See *Dixon v. State of Florida,* 388 F.2d 424, 426 (5th Cir. 1968).

For all the foregoing reasons, dismissal of this action for lack of subject matter jurisdiction was egregious error and must be reversed.

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IN THE
SUPREME COURT OF PENNSYLVANIA
No. 0034 M.D. APPEAL DOCKET, 1992

MERRY J. MURTAGH, *et al.*,

Appellants,

v.

COUNTY OF BERKS, *et al.*,

Appellees.

BRIEF FOR APPELLEES

On Appeal from the Order of the Commonwealth Court Filed January 9, 1992 at Nos. 625 C.D. 1991 and 771 C.D. 1991 Reversing the Order of the Court of Common Pleas of Berks County Entered January 23, 1991 in Civil Action No. 5182-89 A.D.

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I. COUNTER-STATEMENT OF THE QUESTION INVOLVED 1

II. COUNTER-STATEMENT OF THE CASE ... 2

III. SUMMARY OF ARGUMENT 12

IV. ARGUMENT 14

A. Where Administration of State and Local Taxation is Challenged, Section 1983 Does Not Permit a Plaintiff to Circumvent the Plain, Adequate and Complete Remedies Available Under State Law 14

1. Introduction 14

2. Section 1983 tax challenges represent a special category of cases where the exhaustion of state remedies can be mandated 15

3. Plaintiffs' Supremacy Clause argument lacks merit 23

4. Plaintiffs do not dispute that Pennsylvania's existing remedies are plain, adequate and complete 26

5. The Commonwealth Court's decision is in accord with the vast majority of state court rulings that have addressed this question 29

V. CONCLUSION 33

TABLE OF CITATIONS

CASES: Page

Agoston v. Pennsylvania, 340 U.S. 844 (1950).... 29

Backus v. Chilivis, 224 S.E.2d 370 (Ga. 1976).... 31

Behe v. Chester County Bd. of Assessment Appeals, 952 F.2d 66 (3d Cir. 1991)..... 22

Beverly Bank v. Board of Review, 453 M.E.2d 96 (Ill. App. Ct. 1983), *cert. denied,* 466 U.S. 951 (1984) 30

Boughton Trucking & Materials, Inc. v. County of Will, 593 N.E.2d 1119 (Ill. App. Ct. 1992).... 30

Bung's Bar & Grille, Inc. v. Township Council, 502 A.2d 1198 (N.J. Super. Ct. Law Div. 1985) ... 32

Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988)..... 31

California v. Grace Brethren Church, 457 U.S. 393 (1982)..... 24, 25

Dean v. State, 826 P.2d 1372 (Kan.), *cert. denied,* 112 S. Ct. 2941 (1992) 29

Dennis v. Higgins, 111 S. Ct. 865 (1991)..... 25

Dows v. City of Chicago, 78 U.S. (11 Wall.) 108 (1871) 17

Ex parte Young, 209 U.S. 123 (1908)..... 17

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981)..... 7, 16, 17, 19-21, 23

Felder v. Casey, 487 U.S. 131 (1988)..... 15, 16

Garrett v. Bamford, 582 F.2d 810 (3d Cir. 1978).. 26

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943)..... 19

Greenwich Township v. Murtagh, 601 A.2d 1352 (Pa. Commw. Ct. 1992).....6-10

TABLE OF CITATIONS—*(Continued)*

CASES: Page

Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Rev., 583 N.E.2d 214 (Ind. Tax Ct. 1991) 31-32

Hogan v. Muslof, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S. Ct. 867 (1992) 30

Hewlett v. Rose, 496 U.S. 356 (1990) 16

Johnston v. Gaston County, 323 S.E.2d 381 (N.C. Ct. App. 1984), *review denied*, 329 S.E.2d 392 (N.C. 1985) 31

Jones v. Muir, 511 Pa. 535, 515 A.2d 855 (1986).. 28

L.L. Bean, Inc. v. Bracey, 817 S.W.2d 292 (Tenn. 1991) 29

Linderkamp v. Bismarck Sch. Dist. No. 1, 397 N.W.2d 76 (N.D. 1986) 30

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) 19

McNeese v. Board of Educ., 373 U.S. 668 (1963).. 15

Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975)..... 27

Murtagh v. Greenwich Township, 606 A.2d 904 (Pa. 1992) 10

Nutbrown v. Munn, 811 P-2d 131 (Or. 1990), *cert. denied*, 112 S. Ct. 867 (1992) 27, 28, 30

Patsy v. Board of Regents, 457 U.S. 496 (1982)... 15

Pennhurst State Sch. & Hosp- v. Halderman, 465 U.S. 89 (1984)..... 26

Perez v. Ledesma, 401 U.S. 82 (1971)..... 18

Raschke v. Blancher, 491 N.E.2d 1171 (Ill. App. Ct. 1986), *appeal denied*, (Ill. Oct 2, 1986)..... 30

TABLE OF CITATIONS – *(Continued)*

CASES: Page

Rochester & Pittsburgh Coal Co. v. Board of Assessment & Revision of Taxes of Indiana County, 438 Pa. 506, 266 A.2d 78 (1970) 22

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 23-25, 27

Sipe v. Amerada Hess Corp., 689 F.2d 396 (3d Cir. 1982) 27

Spencer v. South Carolina Tax Comm'n, 316 S.E.2d 386 (S.C. 1984), *aff'd by equaly divided court,* 471 U.S. 82 (1985) 31

Strain v. Baryla, No. TSB-H-84(44)S, 1984 N.Y. Tax LEXIS 309 (N.Y. Tax Comm'n June 1, 1984) 31

Stufflebaum v. Panethiere, 691 S.W.2d 271 (Mo. 1985) 31

Sunderland Properties, Inc. v. County of Berks, 750 F. Supp. 704 (E.D. Pa. 1990) 26

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 16

Zarda v. State, 826 P.2d 1365 (Kan.), *cert. denied,* 112 S. Ct. 2941 (1992) 29

Ziska v. Water Pollution Control Auth., 490 A.2d 509 (Conn. 1985) 31

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. VI, cl. 2 23

STATUTES:

28 U.S.C. § 1341 ..... 17, 18

42 U.S.C. § 1983 ..... passim

42 U.S.C. § 1988 27

TABLE OF CITATIONS – *(Continued)*

STATUTES: Page

42 Pa. Cons. Stat. Ann. § 2503(8) 28
72 Pa. Stat. Ann. § 5020-518.1 3
72 Pa. Stat. Ann. § 5020-519 3
72 Pa. Stat. Ann. § 5050-511 3
72 Pa. Stat. Ann. § 5349(c) 3, 28
72 Pa. Stat. Ann. § 5350 3

COURT RULES:

Pa. R. App. P. 2117(b) 5
U.S. Sup. Ct. R. 10 29

I. COUNTER-STATEMENT OF THE QUESTION INVOLVED

Did the Commonwealth Court err when it held, in accord with the overwhelming consensus of state courts, that a plaintiff cannot bring an independent action under 42 U.S.C. § 1983 to challenge state tax administration where existing state remedies afford the plaintiff plain, adequate and complete relief?

II. COUNTER-STATEMENT OF THE CASE

Merry J. Murtagh, eight other individuals and one partnership are the named plaintiffs in this putative class action filed in the Court of Common Pleas of Berks County on October 31, 1989. Named as defendants in the original complaint were the County of Berks, the Berks County Board of Assessment Appeals and the Berks County Board for the Assessment and Revision of Taxes.

In their complaint, the plaintiffs sought to represent a class "consisting of all owners of real property situated in Berks County who purchased their property since January 1, 1980." *See* R. 38a. Plaintiffs alleged that defendants had adopted a policy, custom and practice of reassessing parcels of real property for property tax purposes only upon change in ownership. *See* R. 40a. The complaint went on to state that these assessment practices "placed a substantial and disproportionate burden of taxation on those individuals and entities who have acquired real property in Berks County in recent years. . . ." *See* R. 41a.

Plaintiffs' complaint contained only one count: a claim "pursuant to 42 USC section 1983." *See* R. 43a. Plaintiffs contended that the assessment practices they complained of deprived them of their rights to due process and equal protection under the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. *See* R. 43a-44a.

With respect to exhaustion of state remedies, the plaintiffs asserted in their complaint:

> All named plaintiffs herein have exhausted their administrative remedies. Furthermore, it would be futile for plaintiffs to bring an appeal from the decision of the Board of Assessments pursuant to 72 Pa. C.S.A. Section 520-518.2 since that provision limits the issues on appeal in such a manner that an appeal would not provide redress of the grievances asserted by plaintiffs herein.

See R. 42a-43a.

Two defendants, the County of Berks and the Berks County Board of Assessment Appeals, filed preliminary objections raising essentially the same four grounds. Three of the four grounds were interrelated and asserted that the plaintiffs had failed to exercise or exhaust the statutory and administrative remedies available to them before the Board of Assessment Appeals as set forth in the General County Assessment Law, *see* 72 Pa. Stat. Ann. §§ 5050-511, 5020-518.1 and 5020-519, and in the Third Class County Assessment Law, *see* 72 Pa. Stat. Ann. §§ 5349(c) and 5350. In the fourth ground, the two defendants asserted that plaintiffs had failed to join certain necessary parties, namely the municipalities and school districts located in Berks County.

In an order dated May 18, 1990, the Court of Common Pleas of Berks County, the Honorable Horace A. Davenport, Senior Judge, specially presiding, dismissed the first three preliminary objections but sustained the fourth, ruling that plaintiffs had failed to join certain necessary parties. The Court of Common Pleas granted plaintiffs leave to file an amended complaint within twenty days.

Plaintiffs filed their amended complaint on June 6, 1990. In addition to including Berks County and the Berks County Board of Assessment Appeals as defendants, plaintiffs' amended complaint named as defendants a total of ninety-four municipalities and school

districts located in Berks County. In all other relevant respects, plaintiffs' amended complaint was identical to plaintiffs' original complaint.

Following service of plaintiffs' amended complaint, many of the newly joined defendants filed preliminary objections. Among the issues raised in those preliminary objections were whether the amended complaint stated a claim for which relief could be granted, whether the newly joined defendants assessed taxes and whether plaintiffs could maintain their 42 U.S.C. § 1983 action even though they had not exhausted the administrative and judicial remedies otherwise available to them.

In an order dated December 3, 1990 and entered January 23, 1991, the Court of Common Pleas overruled and dismissed all preliminary objections raised by the various defendants. On February 20, 1991, several defendants filed a motion asking the Court of Common Pleas to amend its order dismissing the preliminary objections in order to permit immediate interlocutory appeal. Thereafter, numerous other defendants joined in the motion seeking amendment of the order.

In an order entered March 7, 1991, the Court of Common Pleas granted the motion and amended its order entered January 23, 1991 to include this final paragraph:

> This Order is deemed to involve a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from the order may materially advance the ultimate determination of this matter.

No further proceedings of substance have occurred before the Court of Common Pleas in this matter.[1]

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1. Given the procedural posture of this case, plaintiffs have yet to introduce even one shred of evidence in support of the allegations set out in their amended complaint. Thus, it is particularly inappropriate for plaintiffs to say, in their statement of the case, that "under federal and state precedent the scheme for taxing real property in Berks County is indefensible and the deprivation to more recent

Following amendment of the order, two sets of defendants, one led by the Borough of Wyomissing Hills and the other headed by Greenwich Township, filed petitions in the Commonwealth Court requesting permission to appeal. In orders dated April 9, 1991 and April 22, 1991, the Commonwealth Court granted the petitions and consolidated the two appeals.

In its opening brief on appeal to the Commonwealth Court, the group of defendants led by the Borough of Wyomissing Hills argued that since plaintiffs enjoyed a plain, speedy and efficient remedy under state law to vindicate their constitutional rights, the Court of Common Pleas erred in exercising jurisdiction over plaintiffs' § 1983 challenge to Berks County's tax assessment administration.[2]

NOTES *(Continued)*

property purchasers is profound and continuing." *See* Brief of Appellants at 4-5. By including argument in their statement of the case, plaintiffs have violated Pennsylvania Rule of Appellate Procedure 2117(b), which specifically provides that "[t]he statement of the case shall not contain any argument." Pa. R. App. P. 2117(b).

2. The Borough of Wyomissing Hills also argued in its brief on appeal to the Commonwealth Court that, even assuming jurisdiction were proper, a municipality could not be held liable to plaintiffs under 42 U.S.C. § 1983 where the municipality was precluded by statute from setting property tax assessments.

The other group of appellants in the Commonwealth Court, headed by Greenwich Township, raised three issues. First, they too argued that municipalities and school districts could not be held liable to plaintiffs under 42 U.S.C. § 1983 where the municipalities and school districts were precluded by statute from setting property tax assessments. Next, the municipalities and school districts argued that they had not directly violated plaintiffs' constitutional rights and that they could not be held liable, under the doctrine of *respondeat superior*, for the actions of the Board of Assessment Appeals. Last, the municipalities and school districts maintained that, as lesser units of government, they could not be held responsible for the actions of greater units of government to which the municipalities have no material or direct link.

The Commonwealth Court agreed with the first argument raised by the Borough of Wyomissing Hills and ruled that plaintiffs could not maintain their § 1983 action because state remedies

The Commonwealth Court, sitting *en banc,* heard oral argument in this matter on September 11, 1991. On January 9, 1992, the Commonwealth Court issued its opinion. *See Greenwich Township v. Murtagh,* 601 A.2d 1352 (Pa. Commw. Ct. 1992).

Judge Pellegrini, in an opinion joined by President Judge Craig and Judges Doyle, Colins, Palladino and McGinley, ruled that plaintiffs could not bring an independent action under 42 U.S.C. § 1983 because state law provided plaintiffs with a plain, adequate and complete remedy.

The Commonwealth Court began its opinion by outlining the substance of plaintiffs' claims and tracing the procedural posture of this action. *See id.* at 1353-54. The Commonwealth Court then noted the agreement among the plaintiffs and defendants that "federal courts have routinely refrained from interfering with the administration of state taxes. . . ." *Id.* at 1354.

The Commonwealth Court went on to examine at some length the import of the Supreme Court of the United States' holding in *Fair Assessment in Real Estate Ass'n v. McNary,* 454 U.S. 100 (1981). The Commonwealth Court noted that in *McNary,* the Supreme Court wrote that where taxpayers are barred from asserting § 1983 actions against the validity of state tax systems in federal courts, "[s]uch taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." *Greenwich Township v. Murtagh,* 601 A.2d at 1354-55 (footnote omitted) (quoting *McNary,* 454 U.S. at 116 (footnote omitted)).

The Commonwealth Court then addressed plaintiffs' arguments in response to the assertion that the Court of Common Pleas erred in exercising jurisdiction

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NOTES *(Continued)*

afforded them an opportunity for plain, adequate and complete relief. As a result, the Commonwealth Court did not reach any of the other arguments raised in the interlocutory appeals.

over their § 1983 action. Plaintiffs argued before the Commonwealth Court, as they argue here, that Pennsylvania's state courts must entertain their § 1983 claim, without regard to whether the claim circumvents other available adequate state remedies. The Commonwealth Court disagreed, writing:

> The Supreme Court foreclosed the state courts from expanding or limiting the availability of a federal cause of action because Section 1983 advances federal, and not state rights and interests. By doing so, the Supreme Court, in effect, enunciated a principle that while state courts are required to entertain federal causes of action, they should be guided by federal law to determine how federal rights are to be enforced, thereby attempting to assure that the outcome of federal causes of actions would be the same, regardless if decided in a state or federal forum.

Id. at 1355.

Next, the Commonwealth Court noted that the courts of nine states, including the highest courts of eight of those states, have held that a § 1983 challenge to state tax administration cannot be brought where state remedies provide the taxpayer with an opportunity to receive full and adequate relief.[3] *See id.* at 1355-56. The Commonwealth Court also noted that courts in two states had ruled, to the contrary, that a taxpayer could independently maintain a § 1983 action in state court without having exhausted her administrative remedies.[4]

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3. The Commonwealth Court noted that the following state courts have issued decisions in accord with its ruling: the Supreme Court of Connecticut, the Supreme Court of Georgia, the Supreme Court of Missouri, the Supreme Court of North Dakota, the Supreme Court of Oregon, the Supreme Court of South Carolina, the Supreme Court of Tennessee, the Supreme Court of Wisconsin and the Court of Appeals of North Carolina.

4. The two courts cited as having ruled to the contrary are the Supreme Court of Mississippi and a New Jersey trial court, the

Having canvassed the judicial landscape, the Commonwealth Court wrote:

> We join the consensus of other state courts that a Section 1983 challenge to state tax administration is not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief. Both Congress, in enacting the Anti-Tax Injunction Act, and the Supreme Court, by its holding in *Fair Assessment,* prohibiting or declining to exercise jurisdiction, have decided that federal interests are not advanced by allowing federal causes of action to intrude upon a carefully formulated state system to rectify state tax disputes. Since federal courts decline to exercise jurisdiction because federal intrusion in state tax schemes is unwarranted, state courts should also not interfere, because its enforcement of Section 1983 is no less intrusive or disruptive than if enforced by a federal court.

Id. at 1356.

In light of its holding, the Commonwealth Court turned next to see whether Pennsylvania's established administrative remedies provided plaintiffs with a plain, adequate and complete remedy. *See id.* at 1357-58. The Commonwealth Court concluded that plaintiffs could raise and obtain consideration of their constitutional claims through exhaustion of the existing administrative procedures. *See id.* at 1358. The Court wrote:

> we also hold that the General and Third Class County Assessment Laws provide Taxpayers with a plain, adequate and complete remedy. The statutory procedures provide a full hearing before the Board, followed by a judicial determination of the Board's decision by the court of common pleas. Taxpayers may properly raise their constitutional issues before

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NOTES *(Continued)*

Superior Court of New Jersey, Law Division, of Burlington County, New Jersey.

> the Board and before the trial court on appeal. Taxpayers present action circumvents the established administrative procedures for reviewing a tax assessment and should be dismissed.

Id. at 1358-59.[5]

Accordingly, the Commonwealth Court entered an order directing the Court of Common Pleas to dismiss plaintiffs' action for lack of subject matter jurisdiction. *Id.* at 1359.

Judge Smith was the sole dissenter from the Commonwealth Court's decision. In her one paragraph dissent, Judge Smith wrote: "Since taxpayers claim Section 1983 violations as a result of the County and Board's practice, they need not exhaust administrative remedies to pursue their claims." *Id.* at 1359.

On February 10, 1992, plaintiffs petitioned this Court for allowance of appeal. This Court granted allocatur on April 20, 1992. *Murtagh v. Greenwich Township,* 606 A.2d 904 (Pa. 1992).

On appeal, the plaintiffs raise and argue two points. First, they argue that the Commonwealth Court's ruling preempts adjudication of a "core federal right" in violation of the Supremacy Clause of the United States Constitution. *See* Brief of Appellants at 8-13. Second, they argue that the Commonwealth Court unconstitutionally eliminated their federal right to sue under § 1983. *See* Brief of Appellants at 13-16.

Berks County, the Berks County Board of Assessment Appeals and the municipalities and school districts named as defendants in the amended complaint join together in this Brief for Appellees to urge affirmance of the Commonwealth Court's ruling. We argue, for the reasons set forth below, that the Commonwealth Court

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5. In a footnote, the Court wrote: "Due to our resolution of this case on this issue, we need not address Local Governments' contentions contained in their appeal at 625 C.D. 1991." *Greenwich Township v. Murtagh,* 601 A.2d at 1359 n.14.

correctly dismissed plaintiffs' amended complaint because plaintiffs have failed to exhaust the plain, adequate and complete remedies available to them under state law.

III. SUMMARY OF ARGUMENT

The Commonwealth Court correctly rebuffed plaintiffs' attempt to circumvent the plain, adequate and complete remedies available to them under Pennsylvania law for consideration of their federal constitutional claims pertaining to Berks County's tax assessment practices.

While the Supreme Court of the United States has ruled that exhaustion of state remedies generally is not a prerequisite to a suit under 42 U.S.C. § 1983, in the realm of state taxation the Supreme Court has held that this general rule of non-exhaustion yields to the unique and significant state and local concerns implicated by challenges to a state or political subdivision's methods of raising revenue.

Where a § 1983 damages action is brought in federal court challenging the constitutionality of a state or political subdivision's scheme of taxation, the federal court will dismiss the action if the court is satisfied that a plain, adequate and complete remedy exists under state law. Plaintiffs argue that the only type of state court remedy that would qualify as plain, adequate and complete is one that permits the former federal court plaintiff to re-file her § 1983 action in state court. The United States Supreme Court has rejected this argument, and this Court should therefore do likewise.

Instead, it is clear that for a remedy to be plain, adequate and complete, a state merely must offer a plaintiff whose § 1983 tax claim is barred from federal court the opportunity to have her constitutional claims heard administratively, then on appeal to the state's judicial system and then on appeal to the Supreme Court of the United States. Where, as here, the state

remedies are plain, adequate and complete, the concerns of federal law are satisfied.

The Commonwealth Court ruled here that the remedies available to plaintiffs under Pennsylvania law are plain, adequate and complete. Plaintiffs can secure consideration of their constitutional objections before the Board of Assessment Appeals. Then, plaintiffs are entitled to *de novo* review of their constitutional objections on appeal to the Court of Common Pleas. Further appeals can thereafter be pursued to the Commonwealth and Supreme Courts, with final review available in the Supreme Court of the United States. Plaintiffs do not argue on appeal that the Commonwealth Court erred in holding that Pennsylvania law provides them with plain, adequate and complete remedies.

The Commonwealth Court's ruling is consistent with the Supremacy Clause of the United States Constitution and is in harmony with the decisions of the overwhelming majority of state courts that have addressed this issue. Accordingly, the Commonwealth Court's order dismissing plaintiffs' § 1983 action should be affirmed.

IV. ARGUMENT

A. Where Administration of State and Local Taxation is Challenged, Section 1983 Does Not Permit a Plaintiff to Circumvent the Plain, Adequate and Complete Remedies Available Under State Law

1. Introduction

This appeal stands at the crossroads where two significant federal policies collide. On the one hand is the policy that plaintiffs who have been deprived of their federal constitutional rights under color of state law should generally have immediate and unrestricted access to federal and state courts to prosecute actions under 42 U.S.C. § 1983. On the other hand is the policy that courts should refrain from interfering with traditional state and local procedures for addressing challenges raised against the administration of taxation at the state and local levels.

The Supreme Court of the United States has ruled that federal court § 1983 damages actions challenging state or local tax administration must yield to state remedies where those remedies are plain, adequate and complete. The vast majority of state courts to have considered the issue are in agreement, holding that a taxpayer cannot bring a state court § 1983 action to challenge state and local tax administration where the taxpayer seeks to circumvent existing state remedies that are plain, adequate and complete.

Understood in this context, it is clear that the Commonwealth Court's ruling in this case was faithful to federal law and in furtherance of the United States Supreme Court's directive that § 1983 claims brought in state courts must be treated no differently than § 1983 claims brought in federal courts. For these reasons, which are explored in more detail below, the Commonwealth Court's order should be affirmed.

2. Section 1983 tax challenges represent a special category of cases where the exhaustion of state remedies can be mandated

This case does not pose the question of whether plaintiffs are entitled to refunds for their alleged overpayments of property taxes in Berks County. Rather, it merely involves the question of what route these plaintiffs must take in pursuing their claims.

We government entities who join in this brief agree that a state judicial system may not place any outcome-determinative obstacle in the way of a § 1983 claim that would not be encountered if the § 1983 claim were being asserted in federal court. *See Felder v. Casey,* 487 U.S. 131, 138 (1988). Further, we agree that the Supreme Court of the United States has held that exhaustion of administrative remedies generally is not a prerequisite to bringing a § 1983 action in either federal or state court. *See Patsy v. Board of Regents,* 457 U.S. 496, 500-01 (1982); *McNeese v. Board of Educ.,* 373 U.S. 668, 671-73 (1963).

A recurring theme found in these and other decisions is that a § 1983 claim should produce the same result whether brought in state or federal court. *See Hewlett v. Rose,* 496 U.S. 356, 375-76 (1990); *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 66 (1989); *Felder v. Casey,* 487 U.S. at 138.

Specifically, the Supreme Court held in *Howlett* and *Felder* that it would be anomalous for a § 1983 claim to be barred in state court while the claim would be permitted to proceed forward in federal court. Thus, the Supreme Court held in *Hewlett* and *Felder* that the state courts erred in barring the claims.

Likewise, in *Will* the Supreme Court noted that it would be anomalous for a § 1983 claim to fail in federal court and yet be allowed to proceed forward in state court. Thus, in *Will* the Supreme Court held that states, which cannot be sued under § 1983 in federal courts because of the Eleventh Amendment, cannot be sued

under § 1983 in state courts because they are not "persons" as that term is used in the statute.

The principle that should be taken from *Hewlett, Will* and *Felder* is that state courts must treat § 1983 claims generally the same as federal courts, no better and no worse. Thus, it is necessary to examine how federal courts handle § 1983 challenges against state and local tax administration systems.

The direct answer to that question is found in *Fair Assessment in Real Estate Ass'n v. McNary,* 454 U.S. 100 (1981). There, the Supreme Court was asked to decide whether a federal district court must entertain a § 1983 action challenging the allegedly unconstitutional administration of St. Louis County, Missouri's real property tax assessment procedures. The taxpayers in *McNary* alleged, as plaintiffs claim here, that they were deprived of equal protection and due process of law. *See id.* at 106.

The Supreme Court began its opinion in *McNary* by quoting from the unanimous opinion of Justice Field in *Dows v. City of Chicago,* 78 U.S. (11 Wall.) 108, 110 (1871). *See McNary,* 454 U.S. at 102. In *Dows,* a case decided just months before Congress enacted 42 U.S.C. § 1983, Justice Field wrote:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Dows, 78 U.S. (11 Wall.) at 110.

These sentiments proved perceptive. For example, after Congress enacted § 1983 and the Supreme Court held that federal courts could enter injunctions prohibiting state officials from enforcing unconstitutional state

laws, *see Ex parte Young,* 209 U.S. 123 (1908), Congress took action in 1937 to protect the integrity of state and local tax systems from the devastating effects of such injunctions by enacting the Tax Injunction Act, 28 U.S.C. § 1341. The Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Thus, while federal courts could enjoin state officials from enforcing most unconstitutional state laws, Congress prohibited federal courts from enjoining state officials from enforcing unconstitutional state tax laws where state law offered a plain, speedy and efficient remedy.

Some thirty-four years later, the unique state and local concerns implicated in federal challenges to state and local taxation continued to be voiced. This time, those concerns were set forth by no lesser a champion of federal constitutional rights than Justice Brennan. In his separate opinion in *Perez v. Ledesma,* 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part), Justice Brennan wrote:

> The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit

> the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

One year later, the Supreme Court returned to the issue in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972). There, in distinguishing several cases cited for the proposition that federal courts only had jurisdiction over § 1983 cases that implicated "personal" rights, rather than "property" rights, the Court wrote:

> All of these cases involved constitutional challenges to the collection of state taxes. *Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations* and has restricted federal jurisdiction accordingly . . . .

Id. at 542 n.6 (emphasis added).

The tension between § 1983 and Congress's long-standing policy against judicial interference with the enforcement of state tax laws came to a head in *McNary*. When *McNary* came up for decision in 1981, it had long been clear under the Tax Injunction Act that federal courts could not enjoin state tax laws or even declare them unconstitutional if a "plain, speedy and efficient" remedy was available under state law. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943). However, until *McNary* the Court had never examined whether federal courts could hear § 1983 actions seeking damages on account of allegedly unconstitutional state or local tax administration.

In *McNary*, the Court unanimously held that a § 1983 suit seeking damages on account of the allegedly unconstitutional administration of St. Louis County's real property tax assessment system could not be

brought in federal court. The Court's five member majority, in an opinion written by then-Justice Rehnquist, concluded:

> despite the ready access to federal courts provided by *Monroe* [*v. Pape,* 365 U.S. 167 (1961),] and its progeny, we hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.

McNary, 454 U.S. at 116 (footnote omitted).[6] Thus, the majority concluded that deference should be given to state tax procedures free from federal court intrusion.

The other four members of the Court concurred in the judgment in an opinion written by Justice Brennan. The four concurring Justices believed that the Tax Injunction Act evidenced a congressional policy to defer the availability of § 1983 claims until state remedies were exhausted. Justice Brennan wrote:

> Where the obligation to require exhaustion of administrative remedies may be fairly understood from congressional action, or is in accord with congressional policy, not only is § 1983 no bar, but the federal courts should be alert to further those policies.
>
> We plainly have sufficient evidence of such congressional policy here.

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6. In the omitted footnote, the Court wrote that it "discern[ed] no significant difference, for purposes of the principles recognized in this case, between remedies which are 'plain, adequate, and complete,' as that phrase has been used in articulating the doctrine of equitable restraint, and those which are 'plain, speedy and efficient,' within the meaning" of the Tax Injunction Act. *McNary,* 454 U.S. at 116 n.8.

McNary, 454 U.S. at 136 (Brennan, J., concurring in the judgment).

The Supreme Court's primary purpose in *McNary* was to avoid interfering with state tax administration by giving states the chance to apply their procedures and remedies in tax matters before federal remedies are sought in a § 1983 action. It certainly is no less disruptive of Berks County's internal economy and administrative tax procedures for a state court to hear this § 1983 action than it would be for a federal court to hear the suit.

Regardless of which judicial system interferes with Berks County's fiscal operations, the affected county, municipal and school district tax officials would be improperly denied the chance to cure any alleged defects before being subjected to a § 1983 action. Thus, the concerns that provided the basis for the Supreme Court's decision in *McNary* are equally applicable here. As the Court explained in *McNary,* 454 U.S. at 114:

> the intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape,* 365 U.S. 167 (1961). Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.

In sum, the Supreme Court of the United States has held that § 1983 challenges to a state or political subdivision's scheme of tax administration represent a special category of cases where exhaustion of state remedies can be required.[7]

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7. It deserves to be noted that the United States Supreme Court decisions discussed herein are fully consistent with this Court's ruling in *Rochester & Pittsburgh Coal Co. v. Board of Assessment & Revision of Taxes of Indiana County,* 438 Pa. 506, 266 A.2d 78 (1970).

In that suit, a coal company filed a complaint to enjoin application of a revised method of property taxation on the ground that the method violated the company's right to equal protection.

3. Plaintiffs' Supremacy Clause argument lacks merit

Plaintiffs contend on appeal that the Commonwealth Court's decision violated the Supremacy Clause, which provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

We have already explained above that, to the contrary, the Commonwealth Court's decision furthers the Supremacy Clause, because the court's ruling gives effect to Congress's longstanding policy of deference towards state and local taxing authorities.

At bottom, plaintiffs assert that the Supremacy Clause requires states to entertain independent § 1983 actions against state and local taxing authorities without regard to the adequacy of existing state remedies. If such were the case, then we are at a loss to understand why the Supreme Court of the United States ever went to the trouble of determining whether a state's existing remedies qualified as "plain, speedy and efficient" or "plain, adequate and complete."[8]

NOTES *(Continued)*

This Court affirmed the dismissal of the complaint, holding that Common Pleas lacked jurisdiction over the matter because the coal company had failed to pursue the adequate statutory remedies available to it.

The continuing vitality of this Court's decision in *Rochester & Pittsburgh* was recently recognized by the United States Court of Appeals for the Third Circuit in *Behe v. Chester County Bd. of Assessment Appeals,* 952 F.2d 66 (3d Cir. 1991). There, the Third Circuit summarized the holding in *Rochester & Pittsburgh* in the following manner:

> As the Supreme Court of Pennsylvania has explained, Constitutional objections to State taxes should be brought first to "the administrative body which has responsibility for applying the statute on a day-by-day basis. . . . It may well be that all problems will be worked out at that stage, and neither party will be required to resort to the judicial system."

Behe, 952 F.2d at 70 (quoting *Rochester & Pittsburgh,* 438 Pa. at 509, 266 A.2d at 79).

8. It is important to remember the Supreme Court's statement in *McNary* that these two phrases mean roughly the same thing. *See McNary,* 454 U.S. at 116 n.8.

For example, in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 510 (1981), the Supreme Court confronted a § 1983 action in which the plaintiff claimed that the property assessment policy of Cook County, Illinois required her to pay three and one-half times the lawful amount of tax, in violation of her rights to equal protection and due process. The district court had dismissed the suit, finding it barred under the Tax Injunction Act. The United States Court of Appeals for the Seventh Circuit reversed, holding that Illinois law did not provide the plaintiff with a plain, speedy and efficient remedy.

The Supreme Court disagreed and ruled that Illinois did provide the plaintiff with a plain, speedy and efficient remedy, *even though the state law remedy was less attractive. See id.* at 515. The state law remedy did not guarantee the plaintiff interest on her alleged overpayments, while the Court assumed without deciding that the plaintiff would be entitled to such interest under § 1983. *See id.*

In fact, the Court in *Rosewell* held that for a state remedy to qualify as plain, speedy and efficient the remedy merely must meet "certain *minimal* procedural requirements." *Id.* at 512 (emphasis in original). The Court then wrote that a state remedy is plain, speedy and efficient only if it "provides the taxpayer with a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax" followed by the prospect of ultimate review in the United States Supreme Court. *Id.* at 514 (internal quotations omitted).

Similarly, in *California v. Grace Brethren Church*, 457 U.S. 393, 414 (1982), the Court held California's remedy to be plain, speedy and efficient where the taxpayer had available to it administrative remedies, followed by judicial remedies where the taxpayer could raise "all arguments against the validity of the tax."

Then, the taxpayer could "ultimately seek review in this Court." *Id.*[9]

To accept plaintiffs' argument here is to conclude that *Rosewell* and *Grace Brethren* were wrongly decided. If states were required under the Supremacy Clause to entertain independent § 1983 actions even where plain, adequate and complete state remedies exist, one wonders why the Supreme Court went to all the trouble in those two cases (and why lower federal courts ever since have continued to go to the trouble) of deciding whether existing state remedies were sufficient to compensate for the unavailability of a federal action under § 1983.

In sum, it is fully consistent with the Supremacy Clause for a state court to refuse adjudication of a § 1983 challenge against state tax administration where the existing state remedy is plain, adequate and complete. Plaintiffs' suggestion to the contrary must be rejected as inconsistent with the holdings of the United States Supreme court.[10]

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9. The Court also noted that at the time Congress passed the Tax Injunction Act, Congress was well aware that refund procedures were in many states the *sole remedy* to recover unlawfully collected taxes. *See Grace Brethren,* 457 U.S. at 416.

10. The Supreme Court's recent decision in *Dennis v. Higgins,* 111 S. Ct. 865 (1991), is not to the contrary. In *Dennis,* the Court merely decided that § 1983 provides a cause of action for violations of the Commerce Clause of the United States Constitution. The Court was not asked to decide, nor did it decide, whether states could require exhaustion of existing remedies instead of entertaining independent § 1983 actions challenging state taxation.

Plaintiffs also quote a passage from *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 122 (1984), where the Supreme Court wrote in dicta that "[c]hallenges to the validity of state tax systems under 42 U.S.C. § 1983 also must be brought in state court." *Pennhurst,* it should be remembered, was an Eleventh Amendment decision. There, the Court ruled that state officials may not be sued in federal court where the state is the real party in interest. *Pennhurst* did not examine whether state courts must entertain independent § 1983 challenges against state taxing authorities where plain, adequate and complete state remedies exist.

4. Plaintiffs do not dispute that Pennsylvania's existing remedies are plain, adequate and complete

The Commonwealth Court ruled that Pennsylvania's existing state remedies are plain, adequate and complete. Plaintiffs do not challenge that ruling on appeal.

Nonetheless, it is worth noting that the Commonwealth Court is not the first court to rule that Pennsylvania's existing state remedies are plain, adequate and complete. The United States Court of Appeals for the Third Circuit reached the same result in *Garrett v. Bamford*, 582 F.2d 810, 815 (3d Cir. 1978).

And, in October of 1990, the United States District Court for the Eastern District of Pennsylvania dismissed a class action challenging Berks County's real property tax assessment practices, holding that the class enjoyed plain, adequate and complete remedies under state law. *See Sunderland Properties, Inc. v. County of Berks*, 750 F. Supp. 704, 710 (E.D. Pa. 1990).

Because plaintiffs do not press the issue on appeal, it is undisputed that they can secure consideration of their constitutional objections before the Board of Assessment Appeals. Then, they are entitled to *de novo* review of their constitutional objections on appeal to the Court of Common Pleas. Further appeals can then be pursued to the Commonwealth Court and this Court, with final review available in the Supreme Court of the United States.

While plaintiffs make much of the fact that success on their § 1983 claim may permit them to recover attorneys' fees under 42 U.S.C. § 1988, it is clear that for a state remedy to be plain, adequate and complete it "need not be coextensive with that available in the federal courts . . . ." *Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 407 (3d Cir. 1982); *see also Miller v. Bauer*, 517 F.2d 27, 32 (7th Cir. 1975) (state remedy need not be best remedy available or even equal to remedy available in federal court). If plaintiffs cannot recover

their attorneys' fees here, they are no worse off than the plaintiff in *Rosewell,* 450 U.S. at 515, who apparently lost the right to recover both her attorneys' fees *and* the interest on any overpayments she may have made as the result of the unconstitutional overassessments she allegedly suffered.[11]

In sum, because plaintiffs have not argued on appeal that Pennsylvania's existing remedies are anything other than plain, adequate and complete, this Court should accept the point as conceded. In any event, it is clear and certain that the Commonwealth Court's decision finding Pennsylvania's remedies to be plain, adequate and complete is correct.

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11. The Supreme Court of Oregon adopted the same rationale in *Nutbrown v. Munn,* 811 P.2d 131, 141 (Or. 1990), *cert, denied,* 112 S. Ct. 867 (1992). There, the court remarked:

> If, as always will be the case, state administrative agencies are unable to award damages and other forms of relief contemplated by § 1983, the *McNary* decision is necessarily wrong. Why require exhaustion—particularly under the *McNary* majority's theory, which is that exhaustion is necessary under the court-made doctrine of noninterference with state taxation procedures—if an action under 42 U.S.C. § 1983 always will follow in any event. We hold that Taxpayers are not excused from exhausting their state administrative law remedies on the ground that the Department lacks authority to grant them all the relief they seek under 42 U.S.C. § 1983.

Id.

We note further that plaintiffs, should they prevail on their claims while exhausting their plain, adequate and complete state remedies, may be entitled to recover their attorneys' fees from any "common fund" they create for the class they purport to represent. *See* 42 Pa. Cons. Stat. Ann. § 2503(8); *Jones v. Muir,* 511 Pa. 535, 541-42, 515 A.2d 855, 858-59 (1986) (explaining "common fund" doctrine). Pennsylvania's Third Class County Assessment Law specifically permits class action assessment appeals. *See* 72 Pa. Stat. Ann. § 5349(c).

5. The Commonwealth Court's decision is in accord with the vast majority of state court rulings that have addressed this question

The vast majority of state courts to have addressed the issue presented here have concluded that a state court need not entertain an independent § 1983 action challenging state or local tax administration where a plain, adequate and complete state remedy exists. Over the past year or so, the taxpayers who were on the losing side of four of these cases sought *certiorari* from the Supreme Court of the United States to review the rulings. In each instance, the Supreme Court denied review.[12]

In *Dean v. State,* 826 P.2d 1372, 1379-80 (Kan.), *cert. denied,* 112 S. Ct. 2941 (1992), the Supreme Court of Kansas held that the District Court of Johnson County correctly dismissed taxpayers' § 1983 claim where state law provided them with a remedy affording complete and adequate relief. The Supreme Court of Kansas also reached the same result in *Zarda v. State,* 826 P.2d 1365 (Kan.), *cert. denied,* 112 S. Ct. 2941 (1992).

In *L.L. Bean, Inc. v. Bracey,* 817 S.W.2d 292, 297 (Tenn. 1991), the Supreme Court of Tennessee held that a taxpayer could not bring a § 1983 claim challenging state tax administration where Tennessee law provided an exclusive remedy that was plain, adequate and complete.

In *Hogan v. Muslof,* 471 N.W.2d 216, 226 (Wis. 1991), *cert. denied,* 112 S. Ct. 867 (1992), the Supreme

---

12. The Supreme Court's denial of *certiorari* does not act as an expression of opinion on the merits of a matter. *See Agoston v. Pennsylvania,* 340 U.S. 844 (1950) (Frankfurter, J., respecting denial of *certiorari*). Nevertheless, the Supreme Court's decision not to disturb four rulings so similar to the Commonwealth Court's ruling here rebuts plaintiffs' contention that these rulings plainly violate federal law. *See* U.S. Sup. Ct. R. 10 (one consideration upon granting *certiorari* is whether state court has decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court).

Court of Wisconsin held that plaintiffs who have a plain, adequate and complete remedy under state law cannot bring an independent action under § 1983 without first exhausting those remedies.

Similarly, in *Nutbrown v. Munn,* 811 P.2d 131, 142 (Or. 1990), *cert. denied,* 112 S. Ct. 867 (1992), the Supreme Court of Oregon held that plaintiffs who have an adequate state remedy must exhaust that remedy before bringing a § 1983 action.

This Honorable Court should also note that the Supreme Court of North Dakota,[13] the Appellate Court of Illinois,[14] the Supreme Court of Missouri,[15] the Supreme Court of Connecticut,[16] the Court of Appeals of North Carolina,[17] the State Tax Commission of New York,[18] the Supreme Court of South Carolina[19] and the Supreme Court of Georgia[20] have all rendered decisions in accord with the Commonwealth Court's decision here.

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13. *See Linderkamp v. Bismarck Sch. Dist, No. 1,* 397 N.W.2d 76 (N.D. 1986).

14. *See Raschke v. Blancher,* 491 N.E.2d 1171 (Ill. App. Ct. 1986), *appeal denied,* (Ill. Oct 2, 1986). The court in *Raschke* noted that its holding that state remedies must be exhausted before a § 1983 tax action can proceed forward superseded the court's opinion in *Beverly Bank v. Board of Review,* 453 N.E.2d 96 (Ill. App. Ct. 1983), *cert. denied,* 466 U.S. 951 (1984). Thus, plaintiffs' citation of *Beverly Bank* at page 11 of their brief is in error. In May of 1992, the Appellate Court of Illinois reaffirmed its ruling in *Raschke. See Boughton Trucking & Materials, Inc. v. County of Will,* 593 N.E.2d 1119 (Ill. App. Ct. 1992).

15. *See Stufflebaum v. Penethiere,* 691 S.W.2d 271 (Mo. 1985).

16. *See Ziska v. Water Pollution Control Auth.,* 490 A.2d 509 (Conn. 1985).

17. *See Johnston v. Gaston County,* 323 S.E.2d 381 (N.C. Ct. App. 1984), *review denied,* 329 S.E.2d 392 (N.C. 1985).

18. *See Strain v. Baryla,* No. TSB-H-84(44)S, 1984 N.Y. Tax LEXIS 309 (N.Y. Tax Comm'n June 1, 1984).

19. *See Spencer v. South Carolina Tax Comm'n,* 316 S.E.2d 386 (S.C. 1984), *aff'd by equally divided court,* 471 U.S. 82 (1985).

20. *See Backus v. Chilivis,* 224 S.E.2d 370 (Ga. 1976).

Against this impressive array of authority, plaintiffs can muster in their favor just three decisions. Only one is from the highest court of a state.[21] The remaining two decisions are from the Indiana Tax Court, *see Harlan Sprague Dawley, Inc. v. Indiana Dep't of State Rev.*, 583 N.E.2d 214 (Ind. Tax Ct. 1991), and a New Jersey trial court, whose decision to entertain the § 1983 tax challenge was driven by New Jersey's "entire controversy doctrine," which requires all aspects of a controversy to be sued upon at once, *see Bung's Bar & Grille. Inc, v. Township Council,* 502 A.2d 1198, 1215 (N.J. Super. Ct. Law Div. 1985).

While plaintiffs felt secure in ignoring the many state court rulings that support our arguments on appeal, we cannot deny that the three decisions plaintiffs cite support, to some degree or another, their arguments. Nevertheless, a review of all relevant state court decisions makes clear that the vast majority of state courts to have considered, at their highest levels, the issue before this Court have ruled in accord with the Commonwealth Court.

Mere fortuity cannot account for the vast amount of authority that supports the Commonwealth Court's decision. The Commonwealth Court's ruling plainly was correct, and this Court should affirm the order dismissing plaintiffs' amended complaint.

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21. *See Burrell v. Mississippi State Tax Comm'n,* 536 So. 2d 848 (Miss. 1988). Given the lack of authority for their argument on appeal, plaintiffs are relegated to citing a list of state court decisions for the separate proposition that those states "regularly adjudicate §1983 state tax damage claims." *See* Brief of Appellants at 11. This Court can rest assured that none of the cases cited for plaintiffs' separate proposition decides the question of whether a taxpayer may bring an independent action under § 1983 to challenge state tax administration where existing state remedies afford the taxpayer plain, adequate and complete relief.

V. CONCLUSION

For the foregoing reasons, Berks County, the Berks County Board of Assessment Appeals and the municipalities and school districts who join in this brief respectfully request that the Commonwealth Court's order be affirmed.

Respectfully submitted,

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IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

BOROUGH OF WYOMISSING HILLS, BOROUGH OF BIRDSBORO, BOROUGH OF WEST READING, TOWNSHIP OF HEIDELBERG, TOWNSHIP OF LOWER HEIDELBERG, TOWNSHIP OF OLEY, TOWNSHIP OF TILDEN, TOWNSHIP OF UPPER TULPEHOCKEN AND TOWNSHIP OF DOUGLASS,

Appellants,

vs.

MERRY J. MURTAGH, SPENCER LEE CHERASHSORE, FREDERICK MURTAGH, MARY S. MURTAGH AND ANTHONY GIGLIOTTI AND GEORGE CHOVANES, MARGARET CHOVANES, MICHAEL CHOVANES AND LRM ZIEGENFUSS, a Pennsylvania Partnership, and CONCETTA C. GOOD, on behalf of themselves and all owners of real property situated in BERKS COUNTY who purchased their property since January 1, 1980, and COUNTY OF BERKS, COMMONWEATLH OF PENNSYLVANIA, BERKS COUNTY BOARD OF ASSESSMENT APPEALS, BOROUGH OF TOPTON, LOWER ALSACE TOWNSHIP, CITY OF READING, BOROUGH OF BALLY, BOROUGH OF BOYERTOWN, BOROUGH OF FLEETWOOD, BOROUGH OF LENHARTSVILLE, BOROUGH OF LYONS, BOROUGH OF MOHNTON, BOROUGH OF MT. PENN, BOROUGH OF ROBESONIA, BOROUGH OF SHILLINGTON, BOROUGH OF SHOEMAKERSVILLE, BOROUGH OF SINKING SPRING, BOROUGH OF STRAUSSTOWN, BOROUGH OF TEMPLE, BOROUGH OF TOPTON, BOROUGH OF WERNERSVILLE, BOROUGH OF WOMELSDORF, BOROUGH OF WYOMISSING, ALBANY TOWNSHIP, ALSACE TOWNSHIP, AMITY TOWNSHIP, EARL TOWNSHIP, EXETER TOWNSHIP, HEREFORD TOWNSHIP, JEFFERSON

TOWNSHIP, LONGSWAMP TOWNSHIP, LOWER ALSACE TOWNSHIP, MAIDENCREEK TOWNSHIP, MAXATAWNY TOWNSHIP, NORTH HEIDELBERG TOWNSHIP, ONTELAUNEE TOWNSHIP, PENN TOWNSHIP, PERRY TOWNSHIP, PIKE TOWNSHIP, RICHMOND TOWNSHIP, ROCKLAND TOWNSHIP, RUSCOMBMANOR TOWNSHIP, SOUTH HEIDELBERG TOWNSHIP, UNION TOWNSHIP, UPPER TULPEHOCKEN TOWNSHIP, WASHINGTON TOWNSHIP, WINDSOR TOWNSHIP, ANTIETAM SCHOOL DISTRICT, BRANDYWINE HEIGHTS AREA SCHOOL DISTRICT, TULPEHOCKEN AREA SCHOOL DISTRICT, UPPER PERKIOMEN VALLEY SCHOOL DISTRICT, GREENWICH TOWNSHIP, MARION TOWNSHIP, BRECKNOCK TOWNSHIP AND CENTRE TOWNSHIP, CAERNARVON TOWNSHIP, BOROUGH OF KUTZTOWN, BOROUGH OF ST. LAWRENCE, BOROUGH OF HAMBURG, BOROUGH OF LAURELDALE, BOROUGH OF WEST LAWN, SPRING TOWNSHIP, ROBESON TOWNSHIP, OLEY VALLEY SCHOOL DISTRICT, UPPER BERN TOWNSHIP, BOROUGH OF BECHTELSVILLE, BOROUGH OF KENHORST, LEESPORT BOROUGH, COLEBROOKDALE TOWNSHIP, CUMRU TOWNSHIP, MUHLENBERG TOWNSHIP, CONRAD WEISER SCHOOL DISTRICT, BOROUGH OF CENTERPORT, BOYERTOWN AREA SCHOOL DISTRICT, DANIEL BOONE AREA SCHOOL DISTRICT, EXETER TOWNSHIP SCHOOL DISTRICT, FLEETWOOD AREA SCHOOL DISTRICT, GOVERNOR MIFFLIN SCHOOL DISTRICT, KUTZTOWN AREA SCHOOL DISTRICT, MUHLENBERG SCHOOL DISTRICT, CITY OF READING SCHOOL DISTRICT, SCHUYLKILL VALLEY SCHOOL DISTRICT, WILSON SCHOOL DISTRICT, WYOMISSING AREA SCHOOL DISTRICT, HAMBURG SCHOOL DISTRICT and TWIN VALLEY SCHOOL DISTRICT,

Appellees.

No. 771 C.D. 1991
Consolidated with No. 625 C.D. 1991

APPEAL FROM THE INTERLOCUTORY ORDER OF THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA, ENTERED JANUARY 23, 1991, AND AMENDED MARCH 6, 1991, IN CIVIL ACTION NO. 5182-89 A.D.

BRIEF FOR APPELLANTS, BOROUGH OF WYOMISSING HILLS, BOROUGH OF BIRDSBORO, BOROUGH OF WEST READING, TOWNSHIP OF HEIDELBERG, TOWNSHIP OF LOWER HEIDELBERG, TOWNSHIP OF OLEY, TOWNSHIP OF TILDEN, TOWNSHIP OF UPPER TULPEHOCKEN AND TOWNSHIP OF DOUGLASS

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TABLE OF CONTENTS TO APPELLANTS' BRIEF

Docket No. 771 C.D. 1991
Consolidated With No. 625 C.D. 1991

	Page
Table of Citations	ii
Statement of Jurisdiction	1
Order in Question	2
Statement of the Questions Involved	6
Statement of the Case	7
Summary of Argument	10
Argument for Appellants	12
Conclusion	31
Order of Hon. Horace A. Davenport, S.J. dated December 3, 1990	3
Order of Hon. Horace A. Davenport, S.J. dated March 6, 1991	5
Opinion of Hon. Horace A. Davenport, S.J. dated May 22, 1991	32
Appendix "A"	39
Appendix "B"	41
Certificate of Service	47

CASES CITED *Page*

Backus v. Chilivis, 236 Ga. 500, 2245 S.E.2d 370 (1976)..... 15, 16

Baez v. Hennessy, 853 F.2d 73 (2nd Cir. 1988), *cert. denied,* 488 U.S. 1014, 109 S.Ct. 805, 102 L.Ed.2d 796 (1989) 28-29

Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), *cert. denied,* 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973)..... 13, 20

Bush v. Viterna, 795 F.2d 1203 (5th Cir. 1986) 26-28

City of St. Louis v. Praprotnik, 485 U.S. 112, 108, S.Ct. 915, 99 L.Ed.2d 107 (1988)..... 25

Commonwealth ex rel Saunders v. Cramer, 464 Pa. 2, 345 A.2d 702 (1975) 13

Evangelical Catholic Communion, Inc. v. Thomas, 373 F.Supp. 1342 (D. Vermont 1973), *aff'd,* 493 F.2d 1937 (2d Cir. 1974)..... 13

Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981) 13

Garrett v. Bamford, 538 F.2d 63 (3d Cir. 1976) 14

Garrett v. Bamford, 582 F.2d 810 (3d Cir. 1978) 14, 22

Hamill v. Wright, 870 F.2d 1032 (5th Cir. 1989) 29

Harris-Walsh, Inc. v. Dickson City Borough, 420 Pa. 259, 216 A.2d 329 (1966)..... 12

Kelly v. Springett, 527 F.2d 1090 (9th Cir. 1975) . 13

Lang v. Tax Review Board of City of Philadelphia, 69 Pa. Commw. 525, 451 A.2d 1057 (1982) 12

CASES CITED *Page*

Linderkamp v. Bismarck School District No. 1, 397 N.W.2d 76 (N.D. 1986)..... 18-19

Long v. Kistler, 524 F.Supp. 225 (E.D. Pa. 1981)..... 20, 25-26

Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)..... 23, 24

North American Cold Storage Company v. County of Cook, 468 F.Supp. 424 (N.D. Ill., E.D. 1979)..... 30

Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)..... 23, 24

Perez v. Ledesma, 401 U.S. 82, 127 91 S.Ct. 674, 698 27 L.Ed.2d 701, 730, n. 17 (1971)..... 18

Rybak Estate, 424 Pa. 470, 227 A.2d 883 (1967)..... 12

Schepp v. Freemont County, Wyoming, 900 F.2d 1448 (10th Cir. 1990)..... 29

Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985)..... 25

Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (1984), affirmed by equally divided court, 471 U.S. 82, 105 S.Ct. 1859, 85 L.Ed.2d 62 (1985)..... 17

State Tax Commission v. Fondren, 387 So.2d 712 (Miss. 1980), *cert. denied, sub nom. Redd v. Lambert,* 450 U.S. 1040, 101 S.Ct. 1757, 68 L.Ed.2d 237 (1981)..... 16

Stufflebaum v. Banethiere, 691 S.W.2d 271 (Mo. 1985)..... 16

Sunderland Properties, Inc. v. County of Berks, 750 F.Supp. 704 (E.D. Pa. 1990)..... 14, 15

CASES CITED *Page*

Terry v. Cook, 866 F.2d 373 (11th Cir. 1989)..... 29

Wivagg v. Downtown McKeesport Business District Authority, 94 Pa. Commw. 598, 503 A.2d 1112 (1986) 12

Zizka v. Water Pollution Control Authority, 195 Conn. 682, 490 A.2d 509 (1985)..... 17-18

Statutes and Authority

Federal Law

28 U.S.C. § 1341..... 13, 17

42 U.S.C. § 1983..... 6, 10-13, 16-20, 23-24, 26-29

42 U.S.C. § 1988 16

State Law

42 Pa. C.S.A. § 702(b)..... 1

42 Pa. C.S.A. § 762(a)(4) 1

72 P.S. §§ 5020-100, *et seq.* 10, 15

72 P.S. §§ 5342, *et seq.*..... 10, 14, 21

72 P.S. § 5344(a) 21

72 P.S. § 5349(b) 22

72 P.S. § 5350i 22

Act of June 26, 1931, P.L. 1379, § 1, *et seq.*..... 21, Appendix "B"

Act of August 5, 1977, P.L. 182, No. 48, § 1, *et seq.*..... 14, Appendix "A"

Pa. R.C.P. 1311(b)..... 9

I. STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

The Commonwealth Court of Pennsylvania has jurisdiction over this case pursuant to (1) its Order herein dated April 24, 1991 permitting an interlocutory appeal pursuant to 42 Pa. C.S.A. § 702(b); and (2) 42 Pa. C.S.A. § 762(a)(4).

II. THE FOLLOWING THREE PAGES CONSTITUTE A TRUE AND CORRECT COPY OF THE ORDER IN QUESTION AS ENTERED ON JANUARY 23, 1991, AND AS AMENDED BY ORDER DATED MARCH 6, 1991.

IN THE
COURT OF COMMON PLEAS
OF BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

MERRY J. MURTAGH	:	NO. 5182-89
	:	
vs.	:	
	:	
COUNTY OF BERKS, *et al.*	:	

ORDER

SUR: Preliminary Objections of Certain Defendants to the Amended Complaint

AND NOW, this 3rd day of December, 1990, after a review of the several briefs of the Defendants in support of the issues raised on their Preliminary Objections which are collectively set forth as follows:

1. Whether Plaintiffs' have stated a cause of action against the Defendant municipalities and school districts for their taxing policies which allegedly violate the Plaintiff's civil rights under 42 U.S.C. §1983;

2. Whether the Plaintiffs claims are barred by the doctrine of sovereign immunity;

3. Whether the plaintiffs can maintain this action because they have not exhausted other judicial or administrative remedies;

4. Whether Plaintiffs were required to give notice pursuant to 42 Pa. C.S.A. 5522;

5. Whether the State Tax Equalization Board and the Tax Collectors are necessary and indispensable parties;

6. Whether Plaintiffs have complied with Pa. R.C. P.:

(a) 422,
(b) 1018,
(c) 1019, and
(d) 1020 (a) and (b)(1);

7. Whether Plaintiffs claims are barred by the Statute of Limitations;

8. Whether this case can be maintained as a class action;

9. Whether each representative plaintiff has to asset a claim against each defendant;

10. Whether the Plaintiffs who purchased realty three (3) years ago can adequately represent the proposed class;

11. Whether Plaintiffs may maintain this case as a class action because a class is not aggrieved and because of 72 P. S. 5566(b);

12. Whether Plaintiffs may maintain this case as a class action because Plaintiffs purportedly seek a fluid class recovery;

and,

After oral argument in Open Court on Monday, October 8, 1990, the court deems it unnecessary to answer each objection individually since each objection is overruled and all Preliminary Objections are dismissed.

The several Defendants are granted twenty (20) days from the date of this order in which to file responsive pleadings to the Complaint.

BY THE COURT,

/s/ HORACE A. DAVENPORT
Senior Judge
38th Judicial District
Specially Presiding

Extract from the record of said Court
Certified this 23rd day of January 1991
THOMAS W. GAJEWSKI Prothonotary
Marie Franchowal Deputy

IN THE
COURT OF COMMON PLEAS
OF BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

MERRY J. MURTAGH, *et al.*	:	NO. 5182-89 A.D.
	:	
vs.	:	
	:	
COUNTY OF BERKS, *et al.*	:	

ORDER

SUR: Motion of Greenwich Township,
Marion Township, Brecknock Township
and Centre Township for Amendment
of Interlocutory Order

AND NOW, this 6th day of MARCH, 1991, upon consideration of the Moving Defendants' Motion for Amendment of Interlocutory Order, and a review of the Answers to the Amended Complaint filed by the several Defendants, it is hereby ORDERED that the Order of this Court entered January 23, 1991, is amended to include as its last paragraph the following:

"This Order is deemed to involve a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from the Order may materially advance the ultimate determination of this mater."

BY THE COURT,

/s/ HORACE A. DAVENPORT
Horace A. Davenport, Senior Judge
38th Judicial District
Specially Presiding

cc: All Counsel
(Through office of Ct. Admr.)

III. STATEMENT OF QUESTIONS INVOLVED

A. DO PENNSYLVANIA COURTS HAVE SUBJECT MATTER JURISDICTION TO HEAR A §1983 CHALLENGE TO THE BERKS COUNTY TAX ASSESSMENT PROCEDURE WHERE PLAINTIFFS HAVE A PLAIN, SPEEDY AND EFFICIENT REMEDY UNDER STATE LAW?

Answer by Court below: No answer because question not raised below.

Suggested answer: No.

B. CAN MUNICIPALITIES BE HELD LIABLE UNDER 42 U.S.C. §1983 FOR TAX ASSESSMENT PRACTICES IN BERKS COUNTY, WHERE MUNICIPALITIES ARE PRECLUDED BY STATUTE FROM SETTING PROPERTY TAX ASSESSMENTS?

Answer by Court below: Yes.

Suggested answer: No.

IV. STATEMENT OF THE CASE

Plaintiffs filed this action in the Court of Common Pleas of Berks County alleging that they are owners of real property situate in Berks County. Their claims are asserted on behalf of themselves and a purported class of owners of real property who have purchased their properties in Berks County since January 1, 1980. The representative Plaintiffs initially filed suit against the County of Berks and the Berks County Board of Assessment Appeals on October 31, 1989.

The complaint alleges that the County of Berks and the Berks County Board of Assessment Appeals had adopted a policy, custom and practice of reassessing, for property tax purposes, parcels of real property only upon change of ownership. The complaint further alleges that the Defendants' assessment practices place a substantial and disproportionate burden of taxation on those individuals and entities who have acquired real property in Berks County within recent years, and that as a result of this practice, the County of Berks and the Berks County

Board of Assessment Appeals violated Plaintiffs' constitutional rights to Due Process and Equal Protection and are liable to Plaintiffs pursuant to 42 U.S.C. §1983.

Plaintiffs demand monetary damages in an undetermined amount for the deprivation of rights allegedly caused by the tax assessment practices in Berks County. The complaint does *not* claim that Plaintiffs' rights were violated by the tax *collection* practices in Berks County, only that they were violated by the tax *assessment* practices.

The initial Defendants, County of Berks and the Berks County Board of Assessinent Appeals, filed preliminary objections to the complaint on a number of grounds, including the failure of Plaintiffs to join municipalities and school districts located in Berks County as necessary parties to the action. Following oral argument on the preliminry objections on May 18, 1990, the Honorable Horace A. Davenport, Senior Judge, specially presiding, entered an order dismissing three of the four preliminary objections, but sustaining the Defendants' preliminary objections based upon the failure of Plaintiffs to join all indispensable parties.

The lower court granted Plaintiffs leave to amend their complaint to join all necessary parties, and on June 6, 1990, an amended complaint was filed naming approximately 90 municipalities and school districts located in Berks County as defendants in this matter. Many of the municipalities and school districts, including Appellants this action, filed preliminary objections to Plaintiffs' amended complaint. Included in almost every preliminary objection filed was a demurrer raising the failure of Plaintiffs to state a cause of action for which relief could be granted against the municipalities and school districts. After oral argument on the preliminary objections, the lower court overruled and dismissed all preliminary objections by Order dated December 3, 1990, and entered January 23, 1991.

Certain defendants timely filed a motion requesting that the lower court amend its order to include the

language of 42 Pa.C.S. §702(b) as required by Pennsylvania Rule of Appellate Procedure 1311(b). The lower court, on March 6, 1991, granted said motion and amended its order to add the following paragraph:

> This Order is deemed to involve a controlling question of law as to which there is a substantial ground for difference of opinion. An immediate appeal from the Order may materially advance the ultimate determination of this matter.

A first group of municipalities and school districts timely filed a petition for permission to appeal, which petition was granted by Order of this Court, dated April 9, 1991. The term number of said petition for permission to appeal is 625 C.D. 1991. A second group of municipalities filed a petition for permission to appeal at case number 771 C.D. 1991. The second group of petitioners filed a motion for consolidation, which motion was granted by Order of this Court dated April 22, 1991. That second group of petitioners comprise the present Appellants.

V. SUMMARY OF ARGUMENT

A. PENNSYLVANIA COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION, NOR SHOULD THEY EXERCISE SUBJECT MATTER JURISDICTION, OVER A CLAIM CHALLENGING THE BERKS COUNTY TAX ASSESSMENT PROCEDURE PURSUANT TO 42 U.S.C. §1983 WHERE PLAINTIFFS HAVE A PLAIN, SPEEDY AND EFFICIENT REMEDY UNDER STATE LAW.

A question of subject matter jurisdiction may be raised at any stage of the proceedings. Courts of the Commonwealth of Pennsylvania lack jurisdiction over Plaintiffs' claim under 42 U.S.C. §1983. The Tax Injunction Act, 28 U.S.C. §1341 and the principle of comity underlying the Act, would bar Plaintiffs' action

for damages in federal district courts. The Tax Injunction Act could bar this §1983 action in Pennsylvania courts. Further, a Pennsylvania court should inquire into the nature of state remedies provided for the underlying claim and refuse jurisdiction of the case by reference to the practice of federal courts. The General County Assessment Law, 72 P.S. §5020 – 101 *et seq.*, and the Third Class County Assessment Law, 72 P.S. §5342 *et seq.*, afford Plaintiffs a plain, speedy and efficient remedy for any damages occasioned by allegedly unconstitutional assessment and for collection of taxes. It would unduly disrupt the state tax scheme to permit a federal cause of action in state courts where a proper and exclusive state remedy is available.

B. THE LOWER COURT ERRED IN DISMISSING APPELLANTS' PRELIMINARY OBJECTIONS IN THE NATURE OF DEMURRERS BECAUSE APPELLANTS CANNOT BE LIABLE UNDER 42 U.S.C. §1983 FOR BERKS COUNTY TAX ASSESSMENT PRACTICES WHERE APPELLANTS ARE PRECLUDED BY STATUTE FROM SETTING PROPERTY TAX ASSESSMENTS.

The Pennsylvania General Assembly vested in Third Class Counties, such as the County of Berks, the power to appoint and fix compensation for members of county boards of assessment. Further, the General Assembly has specifically abolished local municipal assessors. Appellants are not liable for Berks County assessment practices because they have not ordered or sanctioned those practices. Pennsylvania statutory law, the guidepost to determining the relationship between local municipalities and county assessment practices, clearly indicates that Appellants have insufficient control over Berks County assessments to impose liability on Appellants under 42 U.S.C. §1983.

The General Assembly wisely limited the role of local municipalities in assessment practices. Local municipalities do not benefit from the manner of assessments because actual tax receipts are a function of aggregate assessed values within the boundaries of each municipality, not the method of determining specific values.

VI. ARGUMENT

A. PENNSYLVANIA COURTS LACK SUBJECT MATTER JURISDICTION, NOR SHOULD THEY EXERCISE SUBJECT MATTER JURISDICTION, TO HEAR PLAINTIFFS' §1983 CHALLENGE TO THE BERKS COUNTY TAX ASSESSMENT SCHEME WHERE PLAINTIFFS HAVE A PLAIN, SPEEDY AND EFFICIENT REMEDY UNDER STATE LAW.

Although Appellants did not raise the issue of subject matter jurisdiction in their preliminary objections, the law is well settled that jurisdiction over the subject matter is never waived and may be raised at any time, even for the first time on appeal. *Rybak Estate,* 424 Pa. 470, 227 A.2d 883 (1967); *Harris-Walsh, Inc. v. Dickson City Borough,* 420 Pa. 259, 216 A.2d 329 (1966). Indeed, jurisdictional questions may be raised by an appellate court sua sponte. *Wivagg v. Downtown McKeesport Business District Authority,* 94 Pa. Commw. 598, 503 A.2d 1112 (1986); *Lang v. Tax Review Board of City of Philadelphia,* 69 Pa. Commw. 525, 451 A.2d 1057 (1982).

Plaintiffs, property owners in Berks County, claim in their amended complaint that the tax assessment practices in Berks County violate their civil rights. Specifically, Plaintiffs allege that properties which have been purchased from 1980 until the present date are assessed for purposes of real estate taxes at values higher than the values assigned to similar properties which were purchased prior to 1980, and accordingly, that Plaintiffs

have paid more taxes based on those assessments than they would have paid had reassessments been uniform. Plaintiffs seek only monetary damages under 42 U.S.C. §1983 and do not seek injunctive relief.

Generally, actions pursuant to 42 U.S.C. §1983 may properly be brought in the courts of Pennsylvania. *Commonwealth ex rel Saunders v. Cramer,* 464 Pa. 2, 345 A.2d 702 (1975). However, taxpayers may not bring a §1983 action in federal court regarding taxation provided by state statute inasmuch as any such action would be precluded by the Tax Injunction Act, 28 U.S.C. §1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Tax Injunction Act bars such actions in federal courts where the relief requested, as here, is for damages. *Kelly v. Springett,* 527 F.2d 1090 (9th Cir. 1975); *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972) *cert. denied,* 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973). Federal courts will not entertain such cases whether the damages are essentially a refund for overpaid taxes or other damages. This abstention in actions involving damages other than refunds has been articulated as a reluctance to make a determination as to the alleged unconstitutional deprivation, essentially declaratory relief, as a necessary step before determining damages. *Evangelical Catholic Communion, Inc. v. Thomas,* 373 F.Supp. 1342 (D. Vermont 1973), *aff'd.* 493 F.2d 1397 (2d Cir. 1974). The United States Supreme Court recently confirmed this result based on the doctrine of comity, a principle underlying the Tax Injunction Act. *Fair Assessment In Real Estate Association, Inc. v. McNary,* 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). The question then arises as to whether Pennsylvania courts should entertain jurisdic-

tion of a claim under a federal remedial statute where the federal courts cannot.

Pennsylvania statutory law provides a plain, speedy and efficient remedy. In 1977 Pennsylvania amended its tax assessment statutory review procedure in response to the decision of the Third Circuit Court of Appeals in *Garrett v. Bamford,* 538 F.2d 63 (3d Cir. 1976) ("*Garrett I*"), which held that the Pennsylvania statutory procedure to review county real estate taxes did not provide Plaintiffs with a "plain, speedy and efficient remedy" in Pennsylvania courts. Consequently, Pennsylvania amended 72 P.S. §5349(c)(2) to address the deficiency cited in *Garrett I*:

> For the purpose of assessment appeals under this act, the term "person" shall include, in addition to that provided by law, a group of two or more persons acting on behalf of a class of persons similarly situated with regard to the assessment.

Act of August 5, 1977, P.L. 182, No. 48, §1. (See Appendix A for full text.)

Subsequently, in *Garrett v. Bamford,* 582 F.2d 810 (3d Cir. 1978) ("*Garrett II*"), the Third Circuit Court of Appeals held that the 1977 amendment provided a "plain, speedy and efficient remedy" in the Pennsylvania courts and was adequate to defeat federal jurisdiction under the Tax Injunction Act.

More recently, the District Court for the Eastern District of Pennsylvania in the case of *Sunderland Properties, Inc. v. County of Berks, Pa.,* 750 F.Supp. 704 (E.D. Pa. 1990), reaffirmed that the Third Class County Assessment Law, 72 P.S. §5342 *et seq.,* together with the General County Assessment Law, 72 P.S. §5020-101 *et seq.,* affords plaintiffs a plain, adequate, and complete remedy in challenging the very same real estate tax assessment practices of which Plaintiffs complain in the instant case. In *Sunderland,* the District Court held that the principle of comity barred plaintiffs' action under 42 U.S.C. §1983. The Court noted that the available state

remedy need only be adequate, and need not be coextensive with the remedies available in federal court. The state remedy "need not be the best or most convenient one." *Id.* at 707.

If Plaintiffs are precluded from bringing a §1983 action in federal court challenging the real estate tax assessment practices of Berks County, then Plaintiffs should not be able to evade the prohibition of the Tax Injunction Act by bringing a §1983 action in state court. The very same principles which prompted Congress to enact the Tax Injunction Act, namely a general recognition that state taxation embraces uniquely sensitive local concerns and that the greatest possible deference should be paid to state remedial schemes, apply equally to §1983 actions brought in state court.

Indeed, the majority of state courts which have addressed this issue have refused to accept subject matter jurisdiction over §1983 actions brought in state court. In one of the earliest cases addressing this issue, the Supreme Court of Georgia held in *Backus v. Chilivis,* 236 Ga. 500, 224 S.E.2d 370 (1976), that where the state provided an adequate statutory remedy, plaintiffs could not challenge the tax assessments of their property through a §1983 action in state court. The Court noted that where federal courts would be precluded from entertaining jurisdiction in such a case, "[I]t would be anomalous to allow the appellants to circumvent recognized and established state procedures for equalizing tax assessments simply by filing a §1983 suit in a Georgia court against county officials." *Id.* at ____ , 224 S.E.2d at 374. The Court noted that the "overriding interests of the state in an efficient, expeditious and nondisruptive resolution of ad valorem tax disputes would be seriously impaired, if not destroyed, by the allowance of such suits." *Id.*

The Mississippi Supreme Court confronted a similar issue in *State Tax Commission v. Fondren,* 387 So.2d 712 (Miss. 1980) *cert. denied, sub nom. Redd v. Lambert,* 450 U.S. 1040, 101 S.Ct. 1757, 68 L.Ed.2d 237

(1981), where the plaintiffs sought an injunction in state court to preclude the state tax commission from approving the assessment rolls of any county until the commission had equalized the assessment roles among the counties. The Court rejected plaintiffs' claims for attorney's fees brought under 42 U.S.C. §1983 and §1988 stating that while state courts have concurrent jurisdiction with federal courts in §1983 actions, state courts have no more jurisdiction than a federal court to entertain such an action. The Court reasoned that the §1983 cause of action was precluded in state court because it was precluded in federal court. *Id.* 387 So.2d at 723. See also *Stufflebaum v. Banethiere,* 691 S.W.2d 271 (Mo. 1985) (If §1983 could be invoked to challenge allegedly unconstitutional imposition of a tax on real estate, "the obstruction to the collection of taxes would be so frequent as to be intolerable."); *Spencer v. South Carolina Tax Commission,* 281 S.C. 492, 316 S.E.2d 386 (1984) *aff'd. by equally divided court,* 471 U.S. 82, 105 S.Ct. 1859, 85 L.Ed.2d 62 (1985) (state remedies for asserting rights may not be circumvented by invoking §1983).

In what is perhaps the best reasoned opinion in this line of cases, the Supreme Court of Connecticut in *Zizka v. Water Pollution Control Authority,* 195 Conn. 682, 490 A.2d 509 (1985), held that while the Tax Injunction Act does not deprive state courts of all jurisdiction to hear §1983 challenges to state taxes, state courts should look to the federal act in determining whether similar limitations under state law are appropriate. Stating that the Tax Injunction Act was rooted in principles of federalism reflecting the policy that federal courts should not interfere with the collection of state taxes, the Court concluded that the "logical implication from federalism is that state courts should themselves determine the adequacy of state remedies for claims contesting state taxes" *Id.* at ____, 490 A.2d at 513. The Court stated further, "[A]lthough §1341 does not operate as a jurisdictional barrier in state courts, it nonetheless

points the way to the proper standard by which state tax challenges should be measured." *Id.* Noting that the federal courts had already held that Connecticut law provided a "plain, speedy and efficient" remedy, the Court saw "no need to subject state tax collectors to state actions brought under §1983," and held that the trial court lacked jurisdiction to entertain the plaintiffs' challenge to the tax system. *Id.* at ____, 490 A.2d at 514.

In the more recent case of *Linderkamp v. Bismarck School District No. 1,* 397 N.W.2d 76 (N.D. 1986), the Supreme Court of North Dakota adopted the reasoning of the Connecticut Supreme Court in *Zizka,* and held that plaintiffs' §1983 action challenging certain school district tax practices was not cognizable in state court. The Court agreed with the *Zizka* court that the Tax Injunction Act did not impose a *per se* proscription of state court §1983 jurisdiction. Instead, the Court looked to the federal act for guidance in determining whether North Dakota courts had jurisdiction to hear plaintiffs' claim. The Court quoted Justice Brennan in his opinion concurring in part and dissenting in part in *Perez v. Ledesma,* 401 U.S. 82, 127, 91 S.Ct. 674, 698, 27 L.Ed.2d 701, 730, n. 17 (1971):

> "The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law."

Linderkamp v. Bismarck School District No. 1, supra., 397 N.W.2d at 79. The Court went on to note that a state court §1983 action, applying a federal remedial statute for alleged violations of federally created rights was "no less of a burden upon the state remedial scheme then would be a §1983 action brought in federal court." *Id.* 397 N.W.2d at 80. Thus, the Court held that a taxpayer was precluded from bringing a §1983 action in state court challenging the levy of state taxes where an adequate state remedy was available.

The reasoning in the above cited line of cases is both compelling and persuasive. In the present case, Plaintiffs are precluded from filing their claim in federal court. Their §1983 claim in state court is no less disruptive of the state tax collection procedures than would be an action in federal court. Plaintiffs have been afforded an adequate statutory remedy under Pennsylvania law but have chosen not to avail themselves of that remedy. To allow them to circumvent the statutory procedure for seeking relief from improper assessments is to invite chaos into the real property tax collection system, which is the primary source of funding for all Pennsylvania counties, municipalities, and school districts.

Moreover, for reasons which are discussed in the following section of this brief, if this Court were to conclude that the state courts have jurisdiction to hear Plaintiffs' §1983 claims, then any recovery by Plaintiffs is likely to result in an absurd and unjust result. If, on the one hand, Berks County and/or the Berks County Board of Assessment Appeals are found liable to Plaintiffs and the municipal defendants are found not liable, then the County and the Board of Assessment Appeals may be required to refund taxes which they did not receive but which were received instead by the municipalities and school districts. On the other hand, if this Court determines that Plaintiffs have stated a viable cause of action against the municipal Defendants and the school district Defendants, then these Defendants

will be subjected to potential liability for the actions of a governmental entity over which they have absolutely no control.

Such a result is contrary to clearly established federal case law which requires that for a municipality to be held liable under §1983, that municipality must adopt a policy or custom evidencing a reckless indifference to plaintiffs' constitutional rights. Either potential outcome is untenable. Further, Plaintiffs must exhaust state administrative remedies before a §1983 claim will be heard regarding tax assessments and collections. *Bland v. McHann, supra; Long v. Kistler,* 524 F.Supp. 225 (E.D. Pa. 1981). Plaintiffs do not even imply that they have exhausted the state administrative remedies. Therefore, the only rational course for this Court to take is to dismiss Plaintiffs' §1983 claim and require Plaintiffs to avail themselves of the exclusive state remedy provided by the legislature in the tax assessment law applicable to third class counties.

B. THE LOWER COURT ERRED IN DISMISSING THE MUNICIPALITIES' PRELIMINARY OBJECTIONS WHERE THE STATUTORY PROVISIONS GOVERNING THE ASSESSMENT OF REAL PROPERTY, SET FORTH IN 72 P.S. §§5342, ET SEQ., PRECLUDE MUNICIPALITIES FROM DETERMINING PROPERTY TAX ASSESSMENTS.

The statutory scheme for the assessment of real estate in third class counties is set forth at 72 P.S. §§5342 et seq. (hereinafter referred to as the "Assessment Act"). The Assessment Act provides for the creation of a board to be known as the board of assessment appeals, in each third class county. Such board shall consist of three members who are appointed by the county commissioners of such counties, and the salaries of the members of the board are to be fixed by the salary board for that county. The original version of the Assessment Act specifically abolished the duties and terms of

the borough, ward, and township assessors in all third class counties "so far as assessments for taxation are concerned." Act of June 26, 1931, P.L. 1379, §1. (See Appendix B for full text). This statutory scheme sets forth the following duties of the board of assessment appeals:

> (a) It shall be the duty of said board, in each county to which this act applies, to make and have supervision of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation for county, borough, town, township, school, poor and institution purposes, and to make and have supervision of listing and valuation of property excluded or exempted from taxation. . . .

72 P.S. §5344(a). Accordingly, no municipality within the county has authority or power to determine real estate assessments for real property located within such municipality.

The Assessment Act states that the board of assessment of appeals shall provide each owner of property and the taxing district having any interest in said property with a notice of any change in the amount of the old assessment and the value of the new assessment together with the established predetermined ratio. 72 P.S. §5349(b). The Assessment Act also provides that any persons aggrieved by any assessment or any taxing district having an interest therein, may appeal to the board for relief. 72 P.S. §5349(c). The taxing district has the same right to appeal the decision of the board of assessment appeals as does a property owner. 72 P.S. §5350i. Additionally, the taxing district may intervene as of right where an appeal is taken by a property owner to the court of common pleas. *Id.* Otherwise, the municipalities have no right, power or authority to affect real property tax assessments. Plaintiffs, however, unlike municipalities, may bring class action appeals to the

board of assessment appeals, 72 P.S. §5349(c), and to the Court of Common Pleas. *Garrett II, supra.*

In their amended Complaint, Plaintiffs have alleged no conduct on the part of the municipalities to establish the tax assessment practices in Berks County which purportedly violate Plaintiffs' rights. Instead, Plaintiffs allege merely that the municipalities have received tax monies in accordance with the allegedly unlawful assessments established by the Board of Assessment Appeals.

Where, as here, the municipal defendants have no control over the tax assessments set by the Board of Assessment Appeals, there can be no liability under 42 U.S.C. §1983 for any improper assessment practices which allegedly violate Plaintiffs' civil rights. It is now well settled that a municipality is a "person" for purposes of 42 U.S.C. §1983, and may be sued under that statute. However, it is equally well settled that a municipality may not be held vicariously liable under §1983 solely on a respondeat superior theory. *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Id.* at 694, 98 S.Ct. at 2037-2038, 56 L.Ed.2d at 638.

In the subsequent case of *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court discussed municipal liability under §1983 for decisions by municipal policy makers on a single occasion. The Court stated in its opinion:

> Our analysis must begin with the proposition that "Congress did not intend municipalities to be

> held liable under action pursuant to official municipal policy of some nature caused a constitutional tort."

Id. at 477, 106 S.Ct. at 1297, 87 L.Ed.2d at 461, *quoting Monell v. New York City Department of Social Services, supra,* at 691, 98 S.Ct. at 2036, 56 L.Ed.2d at 636. The Court then went on to explain its decision in *Monell* as follows:

> In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior.* (Citation omitted) In part, this conclusion rested upon the language of §1983, which imposes liability only on a person who "subjects or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." (Citation omitted) Primarily, however, our conclusion rested upon the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others.* (Citation omitted) We found that, because of these doubts, Congress chose not to create such obligations in §1983. Recognizing that this would be the effect of a federal law of *respondeat superior,* we concluded that §1983 could not be interpreted to incorporate doctrines of vicarious liability. (Citation omitted) (Emphasis in original).

Pembaur v. Cincinnati, supra., at 478-479, 106 S.Ct. at 1297-1298, 89 L.Ed.2d at 462-463. The Court further

illuminated its holding in *Monell* with the following statement:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. (footnote omitted). *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" – that is, acts which a municipality has officially sanctioned or ordered. (Emphasis in original)

Pembaur v. Cincinnati, supra., at 479-480, 106 S.Ct. at 1298, 89 L.Ed.2d at 463. The Supreme Court has continued to follow this "official policy" analysis contained in *Monell* in considering municipal liability for the acts of another. See also *St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

Because a municipality cannot be held vicariously liable for the actions of its own employee which are not sanctioned or ordered by the municipality, then a municipality cannot be held vicariously liable for the actions of a board of assessment appeals over which it has no control whatsoever. In the instant case, the municipalities have neither "sanctioned" nor "ordered" the tax assessment practices of the Berks County Board of Assessment Appeals. Appellants have not delegated policy-making authority by ordinance creating the Berks County Board of Assessment Appeals. *See e.g. Shelton v. City of College Station,* 754 F.2d 1251 (5th Cir. 1985). Under the Commonwealth's Assessments Act, Appellants do not create the Board, appoint its members or control their decisions. Under no stretch of the imagination can the actions of the Board of Assessment Appeals be considered the acts "of the municipality." Therefore, the municipalities cannot properly be held liable for any improper tax assessment practices in Berks County.

In *Long v. Kistler,* 524 F.Supp. 225 (E.D. Pa. 1981), plaintiffs brought a civil rights action under 42 U.S.C. §1983, challenging the real estate taxes paid to Upper Perkiomen School District, which encompassed townships within both Berks County and Montgomery County. Plaintiffs, whose real property was located in Berks County, complained that the means of determining the market and assessed values of their properties for real estate tax purposes resulted in higher values on their properties than those of similar properties in the Montgomery County portion of the school district. Hence, plaintiffs complained that they paid substantially more school taxes, a result which plaintiffs contended was violative of the Due Process and Equal Protection clauses of the federal and state constitutions and 42 U.S.C. §1983. In dismissing the plaintiffs' complaint against the school district, the District Court stated in pertinent part:

> In the case at bar, plaintiffs allege that the school district has the power to levy taxes on real property and that state law requires the school district to apply the market value and ratios certified by the (State Tax Equalization Board). The school district did not, and does not, determine the assessed value of the properties. The county board of assessment appeals initially assesses the real property values, albeit without regard to assessments or methods thereof employed by other counties. Pennsylvania law requires that the boards certify the assessments to the STEB, which must certify the market value of real estate in each government unit and determine and certify the ratio of assessed value to market value. School districts simply apply the market values and apply the ratios certified by the STEB.

Id. at 228. Thus, the District Court recognized that a political subdivision cannot be held liable for a policy or

custom of another governmental body over which the political subdivision has no authority or control.

Other federal court decisions have similarly refused to hold government units liable under §1983 for the actions of officials or employees under the control of another governmental unit. In *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), a class of all current and future inmates in Texas' county jails sued under 42 U.S.C. §1983, asking a federal district court to compel the Texas commission on jail standards to discharge its state imposed duties to implement a policy that all county jail facilities in the State of Texas conform to certain minimum standards of construction, maintenance, and operation. The district court granted a motion to dismiss, holding that the commission's alleged breach of its statutory duties could not give rise to a constitutional wrong. The Circuit Court of Appeals affirmed, holding that the Texas commission had no supervisory liability for the actions of the counties, which were directly responsible for the operations of the county jails.

The Court noted that while the commission had a duty to promulgate standards and investigate compliance, the statute did not impose a legal obligation to enforce those standards. In refusing to hold the commission liable, the Court of Appeals enunciated the role of state law in identifying the responsible state actor:

> After one has found a deprivation of a federally secured right and has determined that it resulted from state action, one must ask a third question: who is the state actor responsible for the violation? Unlike the first two questions, this will usually be answered exclusively by reference to state law and practice. Most violations of §1983 occur as incidents of the exercise of perfectly legitimate state powers, such as deploying police forces, operating prisons, and acting as an employer in carrying out the manifold tasks of modern government. The states have virtually complete freedom to decide who will be responsible for such tasks, and therewith to

> determine who will be held liable for civil rights violations that occur in the course of carrying them out.

Id. at 1209.

The court refused to hold the state commission responsible for the actions of the counties, noting that there could be no vicaricus liability.

Because the Assessment Act limits Appellants to appeal from individual assessments, Appellants cannot be liable for the actual performance of the Board. That state laws directing the roles of government entities limit §1983 liability can be seen in the case of *Baez v. Hennessy,* 853 F.2d 73 (2nd Cir. 1988) *cert. denied,* 488 U.S. 1014, 109 S.Ct. 805, 102 L.Ed.2d 796 (1989). There, plaintiff was arrested and charged with burglary, assault and sodomy. Plaintiff's case was presented to a grand jury which voted not to indict. However, the assistant district attorney in charge of the presentation to the grand jury misread the grand jury's voting sheet and prepared an indictment in the belief that the vote had been to indict. The indictment was prepared and signed by the jury foreman and the district attorney and filed with the court. Plaintiff was arraigned, at which time he pleaded not guilty and was released on bail. When the mistake was later discovered, the indictment was dismissed. Plaintiff sued the district attorney and the county wherein he was prosecuted. The Court of Appeals reversed the denial of the county's motion for summary judgment holding that under New York law, the district attorney was a state official, not a county official. Citing *City of St. Louis v. Propotnik, supra.,* the Court of Appeals held that the district attorney's prosecutorial acts could not be held to represent the official policy of the county. The Court stated, "[W]here, as here, controlling law places limits on the County's authority over the district attorney, the county cannot be said to be responsible for the conduct at issue." *Id.* at 77.

Numerous other cases stand for the proposition that where state statutory law limits a political subdivision's control over the actions taken by a person affiliated with another governmental unit, the political subdivision cannot be held vicariously liable for the actions of that person under 42 U.S.C. §1983. Thus, in *Hamill v. Wright,* 870 F.2d 1032 (5th Cir. 1989), a county could not be liable for the actions of a state court judge in appointing attorneys for indigent criminal defendants. Similarly, a county cannot be liable for the actions of a state court judge in denying bail and appointed counsel. *Schepp v. Freemont County, Wyoming,* 900 F.2d 1448 (10th Cir. 1990). Nor can a county be liable for firings by a sheriff for political reasons where the county can only determine the number of sheriff's employees, not their hiring and firing. *Terry v. Cook,* 866 F.2d 373 (11th Cir. 1989).

Nor is the mere receipt of tax dollars by the municipalities based upon the tax assessments set by the Board of Assessment Appeals sufficient to establish liability under §1983 against the municipalities. Only where a government unit has authority to classify property for use by its assessment board is the receipt of tax dollars by the government unit based on assessments made by its assessors relevant for determining control and liability. *See North American Cold Storage Company v. County of Cook,* 468 F.Supp. 424 (N.D. Ill., E.D. 1979) (County liable for actions of County Board of Assessment Appeals). The present Appellants have no such control over the Berks County Board of Assessment Appeals.

Apart from the question of whether the municipalities have the authority or power to change the tax assessment scheme in Berks County, which they do not, the argument of liability by receipt of tax dollars presupposes that the municipalities benefitted from the specific tax assessment practices of the Board of Assessment Appeals. It is important to note that real property tax assessments in and of themselves do not determine the

amount of revenues which a municipality receives from its property taxes. The amount of revenue received is a function of a municipality's millage rate multiplied by the assessed value. Municipalities need certain levels of revenue to operate and adjust their millages within state statutory guidelines to achieve operational solvency. It is not a question of municipalities benefitting from wrongful assessments but rather a question of municipalities responding to total assessed values of property within their boundaries. Plaintiffs have not alleged this millage determination to be violative of any constitutional rights nor is it such a violation. Thus, the contentions that the municipalities received windfalls from the current assessment system in Berks County and have a stake in the manner of those assessments is singularly without merit. Tax assessment practice is appropriately conducted on a county-wide scale for uniformity and economy of scale. Accordingly, the Pennsylvania General Assembly wisely made assessment practices a county function.

VII. CONCLUSION

For the foregoing reasons, Appellants respectfully request Your Honorable Court to (i) reverse the Order of the Honorable Horace A. Davenport, S.J., dated December 3, 1990, as amended by Order dated March 6, 1991; and (ii) dismiss Plaintiff's Amended Complaint with prejudice for lack of subject matter jurisdiction.

Respectfully submitted,

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MERRY J. MURTAGH, SPENCER LEE CHERASHORE, FREDERICK MURTAGH, MARY S. MURTAGH and ANTHONY GIGLIOTTI and GEORGE CHOVANES, MARGARET CHOVANES, MICHAEL CHOVANES and LRM ZIEGENFUSS, a Pennsylvania Partnership, and CONCETTA C. GOOD, on behalf of themselves and all owners of real property situated in BERKS COUNTY who purchased their property since January 1, 1980, Plaintiffs	:	COURT OF COMMON PLEAS COUNTY OF BERKS CIVIL ACTION -- LAW NO. 5182-89 AD
v.	:	
COUNTY OF BERKS, COMMONWEALTH OF PENNSYLVANIA; BERKS COUNTY BOARD OF ASSESSMENT APPEALS; CITY OF READING; BOROUGH OF BALLY; BOROUGH OF BECHTELSVILLE; BOROUGH OF BERNVILLE; BOROUGH OF BIRDSBORO; BOROUGH OF BOYERTOWN; BOROUGH OF CENTERPORT; BOROUGH OF FLEETWOOD; BOROUGH OF HAMBURG; BOROUGH OF KENHORST; BOROUGH OF KUTZTOWN; BOROUGH OF LAURELDALE; BOROUGH OF LEESPORT; BOROUGH OF LENHARTSVILLE; BOROUGH OF LYONS; BOROUGH OF MOHNTON; BOROUGH OF MT. PENN; BOROUGH OF ROBESONIA; BOROUGH OF ST.	:	JURY TRIAL DEMANDED CLASS ACTION

LAWRENCE; BOROUGH OF :
SHILLINGTON; BOROUGH OF :
SHOEMAKERSVILLE; BOROUGH OF :
SINKING SPRING; BOROUGH OF :
STRAUSSTOWN; BOROUGH OF :
TEMPLE; BOROUGH OF TOPTON; :
BOROUGH OF WERNERSVILLE; :
BOROUGH OF WEST LAWN; :
BOROUGH OF WEST READING; :
BOROUGH OF WOMELSDORF; :
BOROUGH OF WYOMISSING; :
BOROUGH OF WYOMISSING HILLS; :
ALBANY TOWNSHIP; ALSACE :
TOWNSHIP; AMITY TOWNSHIP; :
BERN TOWNSHIP; BETHEL :
TOWNSHIP; BRECKNOCK TOWNSHIP; :
CAERNARVON TOWNSHIP; CENTRE :
TOWNSHIP; COLEBROOKDALE :
TOWNSHIP; CUMRU TOWNSHIP; :
DISTRICT TOWNSHIP; DOUGLASS :
TOWNSHIP; EARL TOWNSHIP; :
EXETER TOWNSHIP; GREENWICH :
TOWNSHIP; HEIDELBERG :
TOWNSHIP; HEREFORD TOWNSHIP; :
JEFFERSON TOWNSHIP; :
LONGSWAMP TOWNSHIP; :
L0WER ALSACE TOWNSHIP; LOWER :
HEIDELBERG TOWNSHIP; :
MAIDENCREEK TOWNSHIP; :
MARION TOWNSHIP; MAXATAWNY :
TOWNSHIP; MUHLENBERG :
TOWNSHIP; NORTH HEIDELBERG :
TOWNSHIP; OLEY TOWNSHIP; :
ONTELAUNEE TOWNSHIP; :
PENN TOWNSHIP; PERRY :
TOWNSHIP; PIKE TOWNSHIP; :
RICHMOND TOWNSHIP; ROBESON :
TOWNSHIP; ROCKLAND TOWNSHIP; :
RASCOMBMANOR TOWNSHIP; SOUTH :
HEIDELBERG TOWNSHIP; SPRING :
TOWNSHIP; TILDEN TOWNSHIP; :
TULPEHOCKEN TOWNSHIP; UNION :
TOWNSHIP; UPPER BERN :
TOWNSHIP; UPPER TULPEHOCKEN :
TOWNSHIP; WASHINGTON :

TOWNSHIP; WINDSOR TOWNSHIP; :
ANTIETAM SCHOOL DISTRICT; :
BOYERTOWN AREA SCHOOL :
DISTRICT; BRANDYWINE HEIGHTS :
AREA SCHOOL DISTRICT; CONRAD :
WEISER AREA SCHOOL DISTRICT; :
DANIEL BOONE AREA SCHOOL :
DISTRICT; EXETER TOWNSHIP :
SCHOOL DISTRICT; FLEETWOOD :
AREA SCHOOL DISTRICT; GOVERNOR :
MIFFLIN SCHOOL DISTRICT; :
HAMBURG AREA SCHOOL DISTRICT; :
KUTZTOWN AREA SCHOOL :
DISTRICT; MUHLENBERG SCHOOL :
DISTRICT; OLEY VALLEY SCHOOL :
DISTRICT; CITY OF READING :
SCHOOL DISTRICT; SCHUYLKILL :
VALLEY SCHOOL DISTRICT; :
TULPEHOCKEN AREA SCHOOL :
DISTRICT; TWIN VALLEY SCHOOL :
DISTRICT; UPPER PERKIOMEN :
VALLEY SCHOOL DISTRICT; WILSON :
SCHOOL DISTRICT; WYOMISSING :
AREA SCHOOL DISTRICT :
Defendants :

PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT OF DEFENDANTS DANIEL BOONE AREA SCHOOL DISTRICT, EXETER TOWNSHIP SCHOOL DISTRICT, FLEETWOOD AREA SCHOOL DISTRICT, GOVERNOR MIFFLIN SCHOOL DISTRICT, KUTZTOWN AREA SCHOOL DISTRICT, MUHLENBERG SCHOOL DISTRICT, CITY OF READING SCHOOL DISTRICT, SCHUYLKILL VALLEY SCHOOL DISTRICT, WILSON SCHOOL DISTRICT AND WYOMISSING AREA SCHOOL DISTRICT

Defendants Daniel Boone Area School District, Exeter Township School District, Fleetwood Area School District, Governor Mifflin School District, Kutztown Area School District, Muhlenberg School District, City of Reading School District, Schuylkill Valley School

District, Wilson School District and Wyomissing Area School District (hereinafter referred to as the "Answering School Districts"), by and through their undersigned counsel, and pursuant to Rule 1017 of the Pennsylvania Rules of Civil Procedure, hereby preliminarily object to the Amended Complaint on the following grounds:

A. The Amended Complaint should be dismissed for lack of conformity to rule of court pursuant to Pennsylvania Rule of Civil Procedure 1017(b)(2) because the representative class plaintiffs do not adequately represent the class.

B. The Amended Complaint should be dismissed pursuant to Pennsylvania Rule of Civil Procedure 1017(b)(4) on the grounds that it fails to state a claim against the Answering School Districts under 42 U.S.C. § 1981 or § 1983.

C. The Amended Complaint should be stricken for lack of conformity to rule of court pursuant to Pennsylvania Rule of Civil Procedure 1017(b)(2) on the grounds that it fails to plead with the requisite specificity any action or inaction of the Answering School Districts which conduct allegedly deprived plaintiffs of their civil rights.

D. The Amended Complaint should be dismissed pursuant to Pennsylvania Rule of Civil Procedure 1017(b)(4), or in the alternative, this the action should be stayed until the pending and previously filed federal court class action involving similar parties and common issues of law and fact is resolved.

E. The Amended Complaint should be dismissed pursuant to Pennsylvania Rule of Civil Procedure 1017(b)(4) since plaintiffs have failed to exhaust clear and efficient state administrative and judicial remedies.

F. In the event that the Amended Complaint is not dismissed or stricken on other grounds, the Answering School Districts hereby move for a more definite statement pursuant to Pennsylvania Rule of Civil Procedure 1017(b)(3) on the grounds that the Amended Complaint

fails to provide the Answering School Districts with adequate notice as to the claims being asserted against them, and accordingly, the Answering School Districts are unable to formulate a meaningful response to the Amended Complaint.

WHEREFORE, the Answering School Districts respectfully request that the Amended Complaint be dismissed with prejudice, that judgment be entered in their favor and against plaintiffs, and that they be awarded their costs, attorneys' fees, and other such relief as the Court may deem appropriate.

/s/ Stephen G. Rhoads
Stephen G. Rhoads

Attorneys for Defendants
Daniel Boone Area School District
Exeter Township School District
Fleetwood Area School District
Governor Mifflin School District
Kutztown Area School District
Muhlenberg School District
City of Reading School District
Schuylkill Valley School District
Wilson School District and
Wyomissing Area School District

Of Counsel:

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IN THE COURT OF COMMON PLEAS
OF BERKS COUNTY, PA
CIVIL ACTION – LAW

MERRY J. MURTAGH, SPENCER LEE CHERASHORE FREDERICK MURTAGH, MARY S. MURTAGH and ANTHONY GIGLIOTTI and GEORGE CHOVANES MARGARET CHOVANES, MICHAEL CHOVANES and LRM ZIEGENFUSS, a Pennsylvania Partnership, and CONCETTA C. GOOD, on behalf of themselves and all owners of real property situated in BERKS COUNTY who purchased their property since January 1, 1980. Plaintiffs,	:	COURT OF COMMON PLEAS – COUNTY OF BERKS NO. 5182-89 AD
v.	:	
COUNTY OF BERKS, COMMONWEALTH OF PENNSYLVANIA; BERKS COUNTY BOARD OF ASSESSMENT APPEALS; CITY OF READING; BOROUGH OF BALLY; BOROUGH OF BECHTELSVILLE; BOROUGH OF BERNVILLE; BOROUGH OF BIRDSBORO; BOROUGH OF BOYERTOWN; BOROUGH OF CENTERPORT; BOROUGH OF FLEETWOOD; BOROUGH OF HAMBURG; BOROUGH OF KENHORST; BOROUGH OF KUTZTOWN; BOROUGH OF LAURELDALE; BOROUGH OF LEESPORT; BOROUGH OF LENHARTSVILLE; BOROUGH OF LYONS; BOROUGH OF MOHNTON; BOROUGH OF MT. PENN; BOROUGH OF ROBESONIA; BOROUGH OF ST. LAWRENCE; BOROUGH OF SHILLINGTON; BOROUGH OF SHOEMAKERSVILLE; BOROUGH OF SINKING SPRING; BOROUGH OF STRAUSSTOWN; BOROUGH OF TEMPLE; BOROUGH OF TOPTON; BOROUGH OF WERNERSVILLE; BOROUGH OF WEST LAWN; BOROUGH OF WEST READING;	:	JURY TRIAL DEMANDED CLASS ACTION AMENDED COMPLAINT

BOROUGH OF WOMELSDORF; :
BOROUGH OF WYOMISSING; BOROUGH :
OF WYOMISSING HILLS; ALBANY :
TOWNSHIP; ALSACE TOWNSHIP; AMITY :
TOWNSHIP; BERN TOWNSHIP; BETHEL :
TOWNSHIP; BRECKNOCK TOWNSHIP; :
CAERNARVON TOWNSHIP; CENTRE :
TOWNSHIP; COLEBROOKDALE :
TOWNSHIP; CUMRU TOWNSHIP; :
DISTRICT TOWNSHIP; DOUGLASS :
TOWNSHIP; EARL TOWNSHIP; EXETER :
TOWNSHIP; GREENWICH TOWNSHIP; :
HEIDELBERG TOWNSHIP; HEREFORD :
TOWNSHIP; JEFFERSON TOWNSHIP; :
LONGSWAMP TOWNSHIP; LOWER :
ALSACE TOWNSHIP; LOWER :
HEIDELBERG TOWNSHIP; :
MAIDENCREEK TOWNSHIP; MARION :
TOWNSHIP; MAXATAWNY TOWNSHIP; :
MUHLENBERG TOWNSHIP; NORTH :
HEIDELBERG TOWNSHIP; OLEY :
TOWNSHIP; ONTELAUNEE TOWNSHIP; :
PENN TOWNSHIP, PERRY TOWNSHIP; :
PIKE TOWNSHIP; RICHMOND :
TOWNSHIP; ROBESON TOWNSHIP; :
ROCKLAND TOWNSHIP; :
RASCOMBMANOR TOWNSHIP; SOUTH :
HEIDELBERG TOWNSHIP; SPRING :
TOWNSHIP; TILDEN TOWNSHIP; :
TULPEHOCKEN TOWNSHIP; UNION :
TOWNSHIP; UPPER BERN TOWNSHIP; :
UPPER TULPEHOCKEN TOWNSHIP; :
WASHINGTON TOWNSHIP; WINDSOR :
TOWNSHIP; ANTIETAM SCHOOL :
DISTRICT; BOYERTOWN AREA SCHOOL :
DISTRICT; BRANDYWINE HEIGHTS :
AREA SCHOOL DISTRICT; CONRAD :
WEISER AREA SCHOOL DISTRICT; :
DANIEL BOONE AREA SCHOOL :
DISTRICT; EXETER TOWNSHIP SCHOOL :
DISTRICT; FLEETWOOD AREA SCHOOL :
DISTRICT; GOVERNOR MIFFLIN :
SCHOOL DISTRICT; HAMBURG AREA :
SCHOOL DISTRICT; KUTZTOWN AREA :
SCHOOL DISTRICT; MUHLENBERG :

SCHOOL DISTRICT; OLEY VALLEY :
SCHOOL DISTRICT; CITY OF READING :
SCHOOL DISTRICT; SCHUYLKILL :
VALLEY SCHOOL DISTRICT; :
TULPEHOCKEN AREA SCHOOL :
DISTRICT; TWIN VALLEY SCHOOL :
DISTRICT; UPPER PERKIOMEN :
VALLEY SCHOOL DISTRICT; WILSON :
SCHOOL DISTRICT; WYOMISSING :
AREA SCHOOL DISTRICT :
Defendants. :

AMENDED COMPLAINT

1. Plaintiffs bring this action on behalf of themselves and a class of owners of real property in Berks County against the Berks County Board of Assessment Appeals and all taxing authorities in Berks County seeking damages for violation of plaintiffs' and the class' civil rights in assessing and taxing real property.

2. Plaintiffs Merry J. Murtagh, Spencer Lee Cherashore, Frederick Murtagh and Mary S. Murtagh are adult individuals residing at R.D. #1 Box 636 Treichler Road, District Township, Berks County, Commonwealth of Pennsylvania and are the owners of twenty-seven (27) acres, more or less, of real property which is zoned residential and is situated in District Township, Berks County.

3. Plaintiffs George, Margaret and Michael Chovanes, are adult individuals residing at R.D. #1 Box 686 Huffs Church Road, Hereford Township, Berks County, Commonwealth of Pennsylvania and are the owners of eighty (80) acres, more or less, of real property which is zoned agricultural and is situated in Hereford Township, Berks County.

4. Plaintiff Anthony J. Gigliotti is an adult individual residing at Box 399, Oysterdale Road, Pike Township, Berks County, Commonwealth of Pennsylvania and is the owner of thirty (30) acres, more or less, of real

property which is zoned agricultural and is situated in Pike Township, Berks County.

5. Plaintiff LRM Ziegenfuss is a Pennsylvania partnership with an address at P.O. Box 308 Ringoes, New Jersey, 08551 and is the owner of one hundred thirty-eight (138) acres, more or less, of real property which is zoned residential and industrial and is situated in the Borough of Kutztown and Maxatawny Township, Berks County.

6. Plaintiff Concetta C. Good is an adult individual residing at R.D.1, Box 235, Fredericksville Road, District Township, Berks County Commonwealth of Pennsylvania and is the owner of six (6) acres, more or less, of real property which is zoned commercial and is situated in District Township, Berks County.

7. Defendant, County of Berks, ("Berks County") is a county of the third class of the Commonwealth of Pennsylvania with its principal offices located in the Berks County Courthouse, 33 North 6th Street, Reading, PA 19601.

8. Defendant, Berks County Board of Assessment Appeals ("Board of Assessment") is a statutorily created instrumentality of Berks County charged, *inter alia*, with the responsibility for making and supervising annual assessments of real property subject to taxation. The Board of Assessment's office is located in the Berks County Courthouse, 23 North 5th Street, Reading, PA 19601.

9. Defendant City of Reading is a municipality in the Commonwealth of Pennsylvania with its principal offices located in City Hall, 815 Washington Street, Reading, Pennsylvania 19601.

10. Defendant, Borough of Bally is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 520 Chestnut Street, Bally, Pennsylvania 19503.

11. Defendant Borough of Bechtelsville is a municipality in the Commonwealth of Pennsylvania with its

principal offices located in Borough Hall, 13 Race Street, Bechtelsville, Pennsylvania 19505.

12. Defendant Borough of Bernville is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 2nd Street and Route 183, Bernville, Pennsylvania 19506.

13. Defendant Borough of Birdsboro is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 113 E. Main Street, Birdsboro, Pennsylvania 19508.

14. Defendant Borough of Boyertown is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 100 S. Washington Street, Boyertown, Pennsylvania 19512.

15. Defendant Borough of Centerport is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Grange Hall, Main Street, Mohrsville, Pennsylvania 19541.

16. Defendant Borough of Fleetwood is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 15 N. Franklin Street, Fleetwood, Pennsylvania 19522.

17. Defendant Borough of Hamburg is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 61 N. 3rd Street, Hamburg, Pennsylvania 19526.

18. Defendant Borough of Kenhorst is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 339 S. Kenhorst Boulevard, Kenhorst, Pennsylvania 19607.

19. Defendant Borough of Kutztown is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 45 Railroad Street, Kutztown, Pennsylvania 19530-1112.

20. Defendant Borough of Laureldale is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 3406 Kutztown Road, Laureldale, Pennsylvania 19605.

21. Defendant Borough of Leesport is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 27 S. Canal Street, Leesport, Pennsylvania 19533.

22. Defendant Borough of Lenhartsville is a municipality in the Commonweaith of Pennsylvania with its principal offices located at 59 Penn Street, Lenhartsville, Pennsylvania 19534.

23. Defendant Borough of Lyons is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, Kemp Street, Lyon Station, Pennsylvania 19536.

24. Defendant Borough of Mohnton is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall 21 N. O'Neill Street, Mohnton, Pennsylvania 19540.

25. Defendant Borough of Mt. Penn is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 200 N. 25th Street, Mt. Penn, Pennsylvania 19606.

26. Defendant Borough of Robensonia is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 15 S. Church Street, Robensonia, Pennsylvania 19551.

27. Defendant Borough of St. Lawrence is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 3301 St. Lawrence Avenue, Reading, Pennsylvania 19606.

28. Defendant Borough of Shillington is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Town Hall, 2 East Lancaster Avenue, Shillington, Pennsylvania 19607.

29. Defendant Borough of Shoemakersville is a municipality in the Commonwealth of Pennsylvania with its principal offices located at Borough Hall, 242 Main Street, Shoemakersville, Pennsylvania 19555.

30. Defendant Borough of Sinking Spring is a municipality in the Commonwealth of Pennsylvania with its

principal offices located in Borough Hall, 502 Penn Avenue, Sinking Spring, Pennsylvania 19608.

31. Defendant Borough of Strausstown is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Fire Hall, Strausstown, Pennsylvania 19559.

32. Defendant Borough of Temple is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 4835 Kutztown Road, Temple, Pennsylvania 19560.

33. Defendant Borough of Topton is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 44 W. Keller Street, Topton, Pennsylvania 19562.

34. Defendant Borough of Wernersville is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 208 N. Penn Avenue, Wernersville, Pennsylvania 19565.

35. Defendant Borough of West Lawn is a municipality located in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 103 Woodside Avenue, West Lawn, Pennsylvania 19609.

36. Defendant Borough of West Reading is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 500 Chestnut Street, West Reading, Pennsylvania 19611.

37. Defendant Borough of Womelsdorf is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 101 N. High Street, Womelsdorf, Pennsylvania 19567.

38. Defendant Borough of Wyomissing is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 22 Reading Boulevard, Wyomissing, Pennsylvania 19610.

39. Defendant Borough of Wyomissing Hills is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Borough Hall, 34 Park Road, Wyomissing Hills, Pennsylvania 19609.

40. Defendant Albany Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in Albany Elementary School, Kempton, Pennsylvania 19529.

41. Defendant Alsace Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Alsace Township Building, Woodside Avenue, Temple, Pennsylvania 19560.

42. Defendant Amity Township is a municipality in the Commonweaith of Pennsylvania with its principal offices located in the Township Building, Old Airport Road and Weavertown Road, Douglassville, Pennsylvania 19518.

43. Defendant Bern Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Old Bernville Road, Reading, Pennsylvania 19605.

44. Defendant Bethel Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Community Center, Klahr Road and I-78, Bethel, Pennsylvania 19507.

45. Defendant Brecknock Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Alleghenyville Road, Mohnton, Pennsylvania 19540.

46. Defendant Caernarvon Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Main and Chestnut Streets, Morgantown, Pennsylvania 19543.

47. Defendant Centre Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Tower and Bucks Hill Road, Mohrsville, Pennsylvania 19541.

48. Defendant Colebrookdale Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Route 73, New Berlinville, Pennsylvania 19545.

49. Defendant Cumru Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Welsh Road, Cedar Top, Mohnton, Pennsylvania 19540.

50. Defendant District Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Weil Road, Boyertown, Pennsylvania 19512.

51. Defendant Douglass Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Douglass Drive, Boyertown, Pennsylvania 19512.

52. Defendant Earl Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Earl Township Building, Corner of Route 73 and Schoolhouse Lane, Boyertown, Pennsylvania 19512.

53. Defendant Exeter Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Gibraltar and DeMoss Roads, Reading, Pennsylvania 19606.

54. Defendant Greenwich Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Lenhartsville School, Lenhartsville, Pennsylvania 19534.

55. Defendant Heidelberg Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Charming Forge Road, Robensonia, Pennsylvania 19551.

56. Defendant Hereford Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Seisholtyville Road, Hereford, Pennsylvania 18056.

57. Defendant Jefferson Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Tulpehocken High School, Bernville, Pennsylvania 19506.

58. Defendant Longswamp Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Main Street, Mertztown, Pennsylvania 19539-0037.

59. Defendant Lower Alsace Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, 25th and Harvey Streets, Mt. Penn, Pennsylvania 19606.

60. Defendant Lower Heidelberg Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Brownsville Road, Sinking Spring, Pennsylvania 19608.

61. Defendant Maidencreek Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Quarry Road, Blandon, Pennsylvania 19510.

62. Defendant Marion Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 149 Main Street, Stouchesburg, Pennsylvania 19567.

63. Defendant Maxatawny Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, 363 Noble Street, Kutztown, Pennsylvania 19530.

64. Defendant Muhlenberg Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, 555 Raymond Street, Reading, Pennsylvania 19605.

65. Defendant North Heidelberg Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Charming Forge Road, Robensonia, PA 19551.

66. Defendant Oley Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Rose Virginia Road, Oley, Pennsylvania 19547.

67. Defendant Ontelaunee Township is a municipality in the Commonwealth of Pennsylvania with its

principal offices located in the Township Building, Route 61, Leesport, Pennsylvania 19533.

68. Defendant Penn Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, North Garfield Road, Bernville, Pennsylvania 19506.

69. Defendant Perry Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 681 Ridge Road, Shoemakersville, Pennsylvania 19555.

70. Defendant Pike Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Pike Township Sportmen's Club, Hill Church Road, Oley, Pennsylvania 19547.

71. Defendant Richmond Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Route 662, Moselem Springs, Pennsylvania.

72. Defendant Robeson Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Route 724, Birdsboro, Pennsylvania 19508.

73. Defendant Rockland Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located at 181 Forgedale Road, Fleetwood, Pennsylvania 19522.

74. Defendant Ruscombmanor Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Princeton, Pennsylvania.

75. Defendant South Heidelberg Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Galen Hall Road and Mountain Top Road, Wernersville, Pennsylvania 19565-9719.

76. Defendant Spring Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, 2800 Shillington Road, Sinking Spring, Pennsylvania 19608.

77. Defendant Tilden Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Old Route 22, Hamburg, Pennsylvania 19526.

78. Defendant Tulpehocken Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Rehrersburg Road, Rehrersburg, Pennsylvania 19550.

79. Defendant Union Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, 177 Center Road, Douglassville, Pennsylvania 19518.

80. Defendant Upper Bern Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Shartelsville Fire Company Engine House, Bernville, Pennsylvania 19506.

81. Defendant Upper Tulpehocken Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Old Route 22, Strausstown, Pennsylvania 19559.

82. Defendant Washington Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building, Barto Road, Bechtelsville, Pennsylvania 19505.

83. Defendant Windsor Township is a municipality in the Commonwealth of Pennsylvania with its principal offices located in the Township Building in Windsor Castle, Harrisburg, Pennsylvania 19526.

84. Defendant Antietam School District is a school district located in the Commonwealth of Pennsylvania. The Antietam School District's offices are located at 25th and Filbert Streets, Mt. Penn, Reading, Pennsylvania 19606.

85. Defendant Boyertown Area School District is a school district located in the Commonwealth of Pennsylvania. Its offices are located at 911 Montgomery Avenue, Boyertown, Pennsylvania 19512.

86. Defendant Brandywine Heights Area School District is a school district located in the Commonwealth

of Pennsylvania. Its offices are located in Topton, Pennsylvania 19562.

87. Defendant Conrad Weiser Area School District is a school district located in the Commonwealth of Pennsylvania. Its offices are located in Robensonia, Pennsylvania 19551.

88. Defendant Daniel Boone Area School District is a school district located in the Commonwealth of Pennsylvania. Its offices are located in Birdsboro, Pennsylvania 19508.

89. Defendant Exeter Township School District is a school district located in the Commonwealth of Pennsylvania. Its offices are located at 3650 Pekiomen Avenue, Reiffton, Reading, Pennsylvania 19606.

90. Defendant Fleetwood Area School District is a school district located in the Commonwealth of Pennsylvania. Its offices are located at 409 N. Richmond Street, Fleetwood, Pennsylvania 19522.

91. Defendant Governor Mifflin School District is a school district located in the Commonwealth of Pennsylvania. Its offices are located at 10 S. Waverly Street, Shillington, Pennsylvania 19607.

92. Defendant Hamburg Area School District is a school district located in the Commonwealth of Pennsylvania. Its offices are located at Windsor Street, Hamburg, Pennsylvania 19526.

93. Defendant Kutztown Area School District is a school district located in the Commonwealth of Pennsylvania. Its principal offices are located at Constitution Boulevard & Trexler Avenue, Kutztown, Pennsylvania 19530.

94. Defendant Muhlenberg School District is a school district in the Commonwealth of Pennsylvania. Its offices are located at 801 Bellevue Avenue, Laureldale, Pennsylvania 19605.

95. Defendant Oley Valley School District is a school district in the Commonwealth of Pennsylvania. Its offices are located in Oley, Pennsylvania 19547.

96. Defendant City of Reading School District is a school district in the Commonwealth of Pennsylvania. Its offices are located at 8th and Washington Street, Administration Building, Reading, Pennsylvania 19601.

97. Defendant Schuylkill Valley School District is a school district in the Commonwealth of Pennsylvania. Its offices are located in Leesport, Pennsylvania 19533.

98. Defendant Tulpehocken Area School District is a school district in the Commonwealth of Pennsylvania. Its offices are located in Bernville, Pennsylvania 19506.

99. Defendant Twin Valley School District is a school district in the Commonwealth of Pennsylvania. Its offices are in Elverson, Pennsylvania 19520.

100. Defendant Upper Perkiomen Valley School District is a school district in the Commonwealth of Pennsylvania. Its offices are located at 201 W. 5th Street, East Greenville, Pennsylvania 18041.

101. Defendant Wilson School District is a school district in the Commonwealth of Pennsylvania. Its offices are located at Grandview Boulevard and Fairview Street, West Lawn, Pennsylvania 19609.

102. Defendant Wyomissing Area School district is a school district in the Commonwealth of Pennsylvania. Its offices are located at Girard and Evans Avenues, Wyomissing, Pennsylvania 19610.

103. The defendant municipalities and school districts listed in paragraphs 9 through 101 have the power and authority to impose and collect taxes based upon assessments of real property.

104. All defendants other than the Board of Assessments shall occasionally be referred to herein as the "Taxing Authorities". Each of the defendant Taxing Authorities is statutorily empowered to levy a tax on real property in Berks County.

CLASS ACTION ALLEGATIONS

105. Representative plaintiffs bring this action on their own behalf and as representatives of a class consisting of all owners of real property situated in Berks County who purchased their property since January 1, 1980.

106. The class is so numerous, consisting of thousands of individuals, partnerships and corporations, that joinder of all members is impracticable.

107. There are numerous questions of fact and law common to the class including, *inter alia*:

a. whether defendants have failed to uniformly and non-discriminatorily assess and tax real property in Berks County;

b. whether defendants' actions, practices and policies are violative of Article VIII, Section 1 of the Pennsylvania Constitution;

c. whether defendants' actions, practices and policies are violative of Article II, Section 26 of the Pennsylvania Constitution;

d. whether defendants' actions, practices and policies are violative of the equal protection clause of the United States Constitution;

e. whether defendants' actions, practices and policies are violative of 28 U.S.C. Section 1981;

f. whether plaintiffs are entitled to damages and other relief under 28 U.S.C. Sections 1983 and 1988.

108. The claims of the representative plaintiffs are typical of the claims of the class in that the assessed values of and the taxes assessed on the real property purchased by the representative plaintiffs were increased solely as a result of the purchase of the real property by the representative plaintiffs.

109. The representative plaintiffs will fairly and adequately assert and protect the interests of the class. Representative plaintiffs include purchasers of residential, commercial, agricultural and industrial property situated in Berks County which has been unlawfully and discriminatorily assessed and taxed as a result of their purchase of said real property.

110. A class action provides a fair and efficient method for adjudication of the controversy and the claims of all plaintiffs, including class plaintiffs.

111. Attorneys for the representative parties will adequately represent the interests of the class and have substantial experience in class actions and civil rights litigation.

112. Representative plaintiffs have no conflict of interest in the maintenance of this class action.

113. Representative plaintiffs have adequate financial resources to assure that the interests of the class will not be harmed.

STATEMENT OF FACTS

114. Representative plaintiffs have, within the past three (3) years, purchased real estate situated in Berks County and each parcel of real estate purchased by each representative plaintiff was, within several months following the date of purchase, reassessed for real estate tax purposes by defendants acting under color of state law.

115. Notwithstanding a legal right and obligation to do so, defendants have never conducted a county-wide reassessment of all real property situated in Berks County, but rather have adopted a policy, custom and practice of, with some minor exception, reassessing for property tax purposes only those parcels of real property which have changed ownership for fair market value.

116. In 1988 the General Assembly of the Commonwealth specifically found:

> The General Assembly finds that numerous counties within this Commonwealth have not reassessed the value of real property for many years. Consequently, while the market value of real property has changed dramatically in recent years, the failure of assessed values to keep pace with these changes in market value has resulted in an inequitable distribution of the tax burden.

72 P.S. § 4750.2101(a)

117. The vast majority of real property in Berks County has not changed ownership in many years and, as a result of the policy, custom and practice of defendants with respect to the reassessment of such properties and the failure to reassess such properties, have not been subject to any reevaluation of fair market value for purposes of real estate taxation.

118. As a result, defendants have placed a substantial and disproportionate burden of taxation on those individuals and entities who have acquired real property in Berks County in recent years, and have further squandered the opportunity to broaden the revenue base of Berks County to the detriment of all taxpayers in the county.

119. Defendant Board of Assessment is statutorily charged with the duty of assessing all real property in Berks County on behalf of the defendant Taxing Authorities. The defendant Taxing Authorities, subject to their right to challenge the assessments, receive the tax assessments and levy taxes on the owners of real property based on those tax assessments.

120. Pursuant to the General County Assessment Law, 72 P.S. Section 5020-101, *et seq.*, and/or the Third Class County Assessment Law, 72 P.S. Section 5342 *et seq.*, defendants are required to assess every parcel of real property located in the county on an annual basis.

121. Pursuant to the General County Assessment Law, 72 P.S. Section 5020-101, *et seq.*, and/or the Third Class County Assessment Law, 72 P.S. Section 5342, *et seq.*, defendants are statutorily obligated to value real

property, for purposes of taxation, according to the actual value thereof. Defendants have in the past and continue to apply a current market value to properties which have been sold, for purposes of reassessment, based solely on the purchase price paid for such property. In contravention of the aforementioned statutes, defendants do not revise the selling price to accomplish equalization with other similar properties within Berks County.

122. Defendants are statutorily obligated to apply the common level ratio, established for Berks County by the State Tax Equalization Board, to the market value of properties of being reassessed.

123. Although the common level ratio for Berks County is 7.6%, defendants have intentionally pursued a policy, custom and practice of applying ratios far in excess of that set by the State Tax Equalization Board, to the detriment of plaintiffs and the class.

124. All named plaintiffs herein have exhausted their administrative remedies. Furthermore, it would be futile for plaintiffs to bring an appeal from the decision of the Board of Assessments pursuant to 72 Pa. C.S.A. Section 5020-518.2 since that provision limits the issues on appeal in such a manner that an appeal would not provide redress of the grievances asserted by plaintiffs herein.

COUNT I

PLAINTIFFS' CLAIMS PURSUANT TO 42 USC SECTION 1983

125. Plaintiffs incorporate herein paragraphs 1 through 123 as though fully set forth.

126. Article I, Section 26 of the Pennsylvania Constitution prohibits discrimination against any person by any political subdivision of the Commonwealth.

127. Article VIII, Section 1 of the Pennsylvania Constitution provides that all taxes shall be uniform

upon the same class of subjects within the territorial limits of the taxing authority.

128. The acts, practices and customs practiced by all defendants herein, as more fully set forth above, constitute violations of the Pennsylvania Constitution.

129. The acts, practices and customs practiced by defendants herein, as more fully set forth above, constitute violations of the General County Assessment Law and the Third Class County Assessment Law.

130. 42 U.S.C. Section 1981 insures to all persons within the jurisdiction of the United States the same right in every state to the full and equal benefit of all laws.

131. The Fourteenth Amendment of the United States Constitution prohibits any state from depriving any person of property without due process of law and denying any person within its jurisdiction the equal protection of the laws.

132. Defendants have deprived plaintiffs and the class of property, to wit, the overcharge of taxes without equal protection as guaranteed by the Constitution and laws of the United States and Pennsylvania.

133. As a result of their unlawful acts, practices and customs alleged hereunder which were undertaken under color of state law, defendants are liable to representative plaintiffs and the class pursuant to 42 U.S.C. Section 1983.

134. As a result of the foregoing, representative plaintiffs and the class have been damaged in an amount still to be determined by virtue of paying taxes on their properties in amounts in excess of what they should have paid if all Berks County real property had been assessed and taxes levied in accordance with law.

WHEREFORE, representative plaintiffs and the class respectfully request that this Court award damages to them and against defendants in an amount to be determined (but which is in excess of $20,000.00), up to and including the date of judgment, together with

interest, costs and reasonable attorneys' fees pursuant to 42 U.S.C. Section 1988.

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VERIFICATION

Merry J. Murtagh, plaintiff herein, states that the facts set forth in the foregoing Amended Complaint are true and correct to the best of her knowledge, information and belief and that this statement is made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

/s/ Merry J. Murtagh

Merry J. Murtagh

Supreme Court, U.S.
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NO. 93-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COUNTY OF BERKS, PENNSYLVANIA, *et al.*,

Petitioners,

v.

MERRY J. MURTAGH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the interlocutory judgment of the Supreme Court of Pennsylvania finding subject matter jurisdiction is a "final order" within the meaning of 28 U.S.C. § 1257(a)?

2. Whether a state is required by the Supremacy Clause of the U.S. Constitution to adjudicate under the Civil Rights Act, 42 U.S.C § 1983, a class action challenge to a county's "Welcome Stranger" policy?

PARTIES TO THE PROCEEDING

Petitioners' statement of the parties to the proceeding is correct. Respondents have no parent or subsidiary companies to list pursuant to Rule 29.1.

TABLE OF CONTENTS

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT 6

I. The Interlocutory Order Of The Pennsylvania Supreme Court, Resolving A Single Federal Issue, Is Not A Final Judgment 6

II. The Supreme Court Of Pennsylvania's Reservation And Limitation Of Issues Renders Its Order Inappropriate For Review By This Court 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Allegheny Pittsburgh Coal Co.
v. County Commission,
488 U.S. 336 (1989) 4

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 7,8

Flynt v. Ohio,
451 U.S. 619 (1981) 6,7

Greenwich Township v. Murtagh,
144 Pa. Commw. 624 A.2d
1352 (1992) 5

Murtagh v. County of Berks,
634 A.2d 179 (Pa. 1993) 5

Nordlinger v. Hahn, ___ U.S. ___,
112 S.Ct. 2326 (1992) 4

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945) 7

San Diego Gas & Electric Co.
v. San Diego,
450 U.S. 621 (1981) 7

United States and
Pennsylvania Constitutions:

U.S. Const. Amend. XIV, § 1 3

U.S. Const. Art. VI, cl.2 2

Pa. Const. Art. VIII, § 1 4

Statutes:

28 U.S.C. §1257(a) 2,6

42 U.S.C. §1983 . . . . . 3, 4, 6-11

72 Pa. C.S. § 5020-101 et seq. 4

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JURISDICTION

For the reasons set forth in Point I, infra., Respondents contend that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review an interlocutory order of a State Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1257(a) of Title 28, United States Code, provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl.2.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

Section 1983 of Title 42, United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Steadily increasing real estate values in Berks County, Pennsylvania created a gaping disparity among property assessments--and therefore taxes paid--between long-term residents and newcomers. Dubbed a "Welcome Stranger" policy, this practice requires newcomers to pay a disproportionate amount of taxes to support local government. Although mandated by State constitution and statute to use a "current value" system of real property taxation,[1] see Pa. Const. Art. VIII, § 1; 72 Pa. C.S. § 5020-101 et seq., governmental entities in Berks County utilized a system of "spot assessment," that is, reassessment for property tax purposes of only those parcels which change ownership for fair market value. App. at 147a.

Five years ago in Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989) this Court declared unconstitutional a West Virginia practice of de facto discrimination engendered by a "Welcome Stranger" policy in a "current value" system of real property taxation. The property tax assessment practices in Berks County resemble the practices in West Virginia with one notable exception: while the West Virginia county had not performed a general reassessment for over ten years, Berks County never conducted a county-wide reassessment in its history. In short, the Petitioners' scheme of

---

[1] A "current value" system requires that all property be taxed at a uniform rate according to its current estimated actual market value. By contrast, an "acquisition value" system, such as was approved by the Court in Nordlinger v. Hahn, ___ U.S. ___, 112 S.Ct. 2326 (1992), assesses property only when it changes hands at its acquisition value.

taxing real property in Berks County is constitutionally indefensible and the deprivations profound.

Respondents are recent residents and taxpayers in Berks County who filed this class action in state court alleging a single cause of action under the federal civil rights law, 42 U.S.C. § 1983, and seeking damages for overpayment of taxes. The trial court overruled the demurrer of certain local governments to the Amended Complaint but certified for appeal the issue of whether the local governments could be liable under § 1983 for the wrongful assessment practices of the Board of Assessment Appeals. The Commonwealth Court, Pennsylvania's intermediate appellate court, never reached this issue. Certain respondents raised for the first time on appeal whether the state court had subject matter jurisdiction over a § 1983 case challenging local taxation. The Commonwealth Court ruled that plaintiffs could not bring their § 1983 action in state court because state administrative and judicial remedies are plain, adequate and complete. Greenwich Township v. Murtagh, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) App. 19a-34a.

The Pennsylvania Supreme Court granted certiorari and, after briefing and oral argument, reversed. The Pennsylvania Supreme Court ruled that:

> where plaintiffs are a class of the taxpayers challenging the constitutionality of the system by which property tax assessments are made, they can maintain their section 1983 suit in common pleas court without first exhausting their statutory remedies.

Murtagh v. County of Berks, 634 A.2d 179, 185 (Pa. 1993) (reprinted in App. at 13a) The court specifically reserved decision on whether state remedies are plain, adequate and complete, and remanded the case to the Commonwealth Court for consideration of the issue certified for appeal.

Petitioners filed the instant Petition for Certiorari within the prescribed period.

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied since there is no jurisdictional basis under 28 U.S.C. § 1257(a) for review of an interlocutory order of a state court. Furthermore, the Supreme Court of Pennsylvania reserved decision regarding whether state remedies are plain, adequate and complete, and specifically limited its ruling to class actions challenging systematic practices. The narrow scope of the Pennsylvania Supreme Court's holding thus makes this case inappropriate for review.

I.

The Interlocutory Order of The Pennsylvania Supreme Court, Resolving A Single Federal Issue, Is Not A Final Judgment.

The sole basis of jurisdiction upon which Petitioners rely in their Petition for a Writ of Certiorari is 28 U.S.C. § 1257(a). Under that statute, the United States Supreme Court has jurisdiction to review only "final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." The final judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State Court . . . ." Flynt v. Ohio, 451 U.S. 619, 620 (1981) (quoting Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945)); see also O'Dell v. Espinozo, 456 U.S. 430 (1982) (United States Supreme Court dismissal for want of jurisdiction of a

§ 1983 action because state supreme court remanded case for trial). "This prerequisite to review derives added force when the jurisdiction of [the United States Supreme] Court is invoked to upset the decision of a State Court." Radio Station WOW, 326 U.S. at 124. The reason for this rule is plain: it avoids piecemeal review by the United States Supreme Court of state court decisions thereby minimizing federal court intrusion into state affairs. See Flynt, 451 U.S. at 621.

The Petition for a Writ of Certiorari filed by Petitioners is devoid of any jurisdictional basis, since the State Supreme Court's opinion is interlocutory. The Pennsylvania Supreme Court remanded this matter to the Commonwealth Court of Pennsylvania with direction to address the further contention raised by the boroughs, townships, school districts and the City of Reading (hereinafter referred to as "the local governments") that the local governments cannot be liable under § 1983 because it is purportedly the County of Berks and the Board of Assessment Appeals, not them, who perform the unlawful assessments. According to the local governments, plaintiffs are attempting to impute liability to the local governments under a theory of respondeat superior. This issue itself raises federal issues and is sufficient reason to render a matter nonfinal and nonreviewable. See San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 632-33 (1981).

This case does not fall within any of the narrow exceptions to the final judgment rule mentioned by the Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-85. There is no identifiable federal policy that will suffer if the state proceeding goes forward. Flynt, 451 U.S. at 622. Indeed, the federal interest in adjudicating § 1983 disputes is advanced by permitting the state trial court, which has concurrent original jurisdiction of § 1983 disputes, to finally decide the case. Nor does this case fit within the exception based upon a separate and independent issue. It cannot be said that the issue in question will survive and require decision regardless of the outcome of

further state proceedings; nor, can it be said that subsequent proceedings "could not remotely give rise to a federal question . . . that may later come here . . . ." Cox Broadcasting Corp., 420 U.S. at 480 (quoting Radio Station WOW, Inc., 326 U.S. at 127). The very issue remanded by the State Supreme Court is a federal question, and further litigation of this § 1983 case likely will raise still more federal questions.

Accordingly, the Petition for a Writ of Certiorari must be denied.

II.

The Supreme Court Of Pennsylvania's Reservation And Limitation Of Issues Renders It Inappropriate For Review By This Court.

In its decision, the Supreme Court of Pennsylvania reserved decision regarding whether the state statutory remedies are "plain, adequate and complete." Thus, even were this Court to grant certiorari and reverse the State Supreme Court, that Court could still decide the reserved issue adversely to Petitioners. The Supreme Court of Pennsylvania also specifically limited its ruling to class actions challenging systematic property assessment practices. It left open the question of whether an individual plaintiff, as opposed to a class of plaintiffs, can maintain a § 1983 action in state court without first exhausting state statutory remedies where the challenge is to an individual assessment. This reservation and limited holding thus makes this case inappropriate for review. Not only is the question presented for review by Petitioners based upon an assumption of state law that has not been decided by the State Supreme Court (i.e., that the state statutory remedies are "plain, adequate and complete"), the narrowness of the State Supreme

Court's holding simply does not present a question sufficient to justify review by the Court at this time.

CONCLUSION

For all the foregoing reasons, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania,
Middle District

BRIEF OF AMICUS CURIAE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

REASONS FOR GRANTING THE WRIT 2

Summary 2

1. The Petition Should Be Granted Because State Courts Of Last Resort Have Resolved The Question Presented In Conflicting Ways 3

2. The Petition Should Be Granted Because It Presents An Important And Unsettled Question Of Federal Law That Should Be Settled By This Court 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988) 4

California v. Grace Brethren Church, 457 U.S. 393 (1982) 5, 7

Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) 5, 6

Felder v. Casey, 487 U.S. 131 (1988) 5

Howlett v. Rose, 496 U.S. 356 (1990) 4, 5

Murtagh v. County of Berks, 634 A.2d 179 (Pa. 1993) ... 4, 5

Spencer v. South Carolina Tax Comm'n, 316 S.E.2d 386 (S.C.1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985) 5

Truck Terminal Motels v. Berks County, 561 A.2d 1305 (Pa. Commw. Ct. 1989), *app. denied*, 581 A.2d 576 (Pa. 1990) 6

CONSTITUTIONS, STATUTES, REGULATIONS AND RULES

U.S. CONST. art. VI, cl. 2 ..... *passim*

Tax Injunction Act, 42 U.S.C. § 1341 7

42 U.S.C. § 1983 ..... *passim*

Third Class County Assessment Law
PA. STAT. ANN., tit. 72 (Supp. 1993-94)

§ 5349 6

§ 5350i 6

Supreme Court Rule 37.2 2

No. 93-1278

In The

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October Term, 1993

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v.

MERRY J. MURTAGH, *et al.*,

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On Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania,
Middle District

BRIEF OF AMICUS CURIAE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

The Pennsylvania School Boards Association is a voluntary association composed of the 501 local public school districts of the Commonwealth of Pennsylvania and the members of the boards of school directors of those school districts. Organized in 1895, the Pennsylvania School Boards Association was the first such association in the nation. The function of the association is to render assistance to local public school districts and to

represent the general public interest in the field of public education.

The Pennsylvania School Boards Association files this brief as *amicus curiae,* with the consent of the parties pursuant to Supreme Court Rule 37.2, because this appeal involves an issue of critical and direct concern to all Pennsylvania public school districts. This brief is filed in support of the Petition for Writ of Certiorari, and urges both that the Petition be granted and that the judgment of the Supreme Court of Pennsylvania be reversed.

It should not be inferred from the positions expressed herein that the Pennsylvania School Boards Association necessarily opposes the underlying goals of the taxpayers in this action. Tax assessment schemes should be fair, uniform, consistent and orderly. When they are not, public backing for tax-supported institutions erodes. It is even possible that assessment practices of the nature alleged to exist in this case actually deprive school districts of property tax revenues. However, the judicial avenue taken by the plaintiffs below poses a much a greater immediate threat to municipal administration and finances.

REASONS FOR GRANTING THE WRIT

Summary.

The Pennsylvania School Boards Association generally concurs with the Petition for Certiorari's cogent discussion of the reasons for granting a writ of certiorari in

this case, which needs no repetition. It is believed appropriate at this juncture to simply offer a few additional and important perspectives.

It is regrettable that the obligation of state courts to hear federal challenges to state tax assessments under 42 U.S.C. § 1983 law should vary from state to state, and that state courts must wrestle with the issue on their own in the absence of direct guidance from the federal courts. The Supreme Court of Pennsylvania's conclusion that recent pronouncements of this Court command state courts to hear such challenges, although in the minority, threatens to prompt disproportionate uncertainty and litigation on this federal question.

The challenge brought in this case clearly illustrates that interference with state tax collection systems engendered by federal challenges under § 1983 is no less intrusive and no less offensive to traditional considerations of comity and federalism when state courts are obligated to entertain them in preference to their statutory remedies. Congress could not have intended that state courts be compelled by federal law to inflict the harm federal courts may not.

1. The Petition Should Be Granted Because State Courts of Last Resort Have Resolved The Question Presented In Conflicting Ways.

Petitioners' survey of state court jurisprudence, which need not be repeated here, amply demonstrates that the decision of the Supreme Court of Pennsylvania is in direct conflict with the results reached by the vast majority of state courts of last resort that have addressed

the question presented by Petitioners for review. *See* Petition, discussion at pp. 15-22.

Consequently, challenges in many states to the assessment of state taxes, constitutional or otherwise, must be pursued exclusively within the administrative and judicial framework devised by the state legislature for that purpose. In those states, litigants may not bypass such remedies by bringing claims under 42 U.S.C. § 1983 in either federal or state court. In Mississippi, and now in Pennsylvania, they may do so in the state courts. *Murtagh v. County of Berks*, 634 A.2d 179, 185 (Pa. 1993) (reprinted in Petition, App. at 12a-13a); *Burrell v. Mississippi State Tax Commission*, 536 So. 2d 848, 862-64 (Miss. 1988). Because this federal question, *see Howlett v. Rose*, 496 U.S. 356, 366 (1990), has thus far been decided exclusively and divergently by state courts, the result is that the availability of a *federal* right of action under § 1983 to challenge tax assessments turns on nothing more than which state flag flies over the courthouse.

The decision of the Supreme Court of Pennsylvania demonstrates that this divergence extends beyond whether some states are simply *amenable* to entertaining § 1983 challenges to tax assessments as an alternative to their own statutory remedies. Here, the Supreme Court of Pennsylvania has concluded that the Supremacy Clause of the United States Constitution *compels* a state court to exercise jurisdiction over a § 1983 challenge, and *prohibits* it from requiring that the state's statutory remedies be pursued, *Murtagh*, 634 A.2d at 184-85, regardless of whether such remedies are plain, adequate and complete. *Id.* at 182 n.11.

The need for resolution of this conflict, recognized when this Court granted certiorari to consider the issue in *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985) (per curiam) (Powell, J. not participating), is made even more acute by the belief of the court below that its conclusion was commanded by this Court's subsequent decisions in *Howlett v. Rose*, 496 U.S. 356 (1990) and *Felder v. Casey*, 487 U.S. 131 (1988). *Murtagh*, 634 A.2d at 185. By suggesting that contrary state decisions reached prior to *Howlett* and *Felder* are of questionable continued validity, Pennsylvania's departure from the mainstream invites renewed litigation of this question in those and many other jurisdictions.

2. The Petition Should Be Granted Because It Presents An Important And Unsettled Question Of Federal Law That Should Be Settled By This Court

This case sharply illustrates the disarray and disruption caused by federal interference in state tax matters, a danger long recognized and sought to be avoided by Congress and this Court. *See California v. Grace Brethren Church*, 457 U.S. 393, 408-11 nn. 22-23 (1982). The intrusiveness and chilling effect brought about by the mere pendency of the action itself is remarkably similar to that observed and condemned by the Court in *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 114 (1981).

Nearly one hundred school districts, townships and other municipalities have been haled into court to defend

themselves at public expense, diverting officials from their duties and revenues from their intended purposes. Such entities, which have the right to appeal tax assessment decisions and to intervene in pending judicial appeals, *Truck Terminal Motels v. Berks County*, 561 A.2d 1305 (Pa. Commw. Ct. 1989), *app. denied*, 581 A.2d 576 (Pa. 1990), would not otherwise be parties if the state statutory mechanisms for challenging tax assessments were required to be pursued and permitted to function as intended. *See* Third Class County Assessment Law, PA. STAT. ANN., tit. 72, §§ 5349, 5350i (Supp. 1993-94). No longer guided by statutory provisions for sequestering and authorizing the partial expenditure of disputed revenues, their treasuries exposed to unknown awards of damages and attorneys fees, local government spending plans are of uncertain reliability.

The evil of federal interference in state tax collections, historically abhorred and forbidden by Congress and this Court, is not dispelled simply because these circumstances result from a § 1983 action brought in a state court. When a state court concludes that it has been commanded by Congress and the Supremacy Clause to disregard state tax assessment remedies in favor of entertaining a federal remedy shaped by the federal courts, the interference remains federal in nature. To suppose that the intrusion upon state tax collection would be any less is to presume that state courts will refuse to provide the same scope of relief normally available to § 1983 litigants in a federal court.

The end result is no less offensive to principles of comity and federalism than were the federal court damages actions barred by this Court in *McNary*, 454 U.S. at

116. The Court's statement therein that "[s]uch taxpayers must seek protection of their federal rights by *state remedies*, provided of course that those remedies are plain, adequate and complete . . . ," *Id.* (emphasis added) (footnote omitted), is difficult to interpret as meaning instead that such taxpayers must seek protection by federal remedies pursued in state courts.

The specific prohibition only of injunctive relief in the Tax Injunction Act, 28 U.S.C. § 1341, has not prevented this Court from extending the Act's restraints to bar declaratory judgment challenges to state tax systems, finding such actions to be equally contrary to the intent of Congress. *Grace Brethren Church*, 457 U.S. at 408. In light of the indications and longstanding sensitivities underlying that intent, it is doubtful that Congress imagined, much less intended, that federal law would dictate the disruptive intrusions and wholesale displacement of state tax assessment remedies the Supreme Court of Pennsylvania believes states are compelled to accept.

It is thus apparent that the importance traditionally attached by Congress and the Court to such considerations is at odds with the view taken by the Supreme Court of Pennsylvania, a view purported nonetheless to be commanded by this Court's pronouncements in non-tax cases. Only by granting the Petition for Writ of Certiorari can a perpetuation of this conflict be avoided.

CONCLUSION

The question presented for review, although one of federal law, has long evaded the scrutiny of the federal courts and is the focus of growing conflict among the state courts of last resort. The importance of this recurring and unsettled question, and the pressing need for a uniform answer, are readily apparent. The Petition for Writ of Certiorari offers a timely and compelling occasion for this Court to attempt again to provide a resolution. *Amicus Curiae* the Pennsylvania School Boards Association respectfully urges that the Petition be granted.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

COUNTY OF BERKS, PENNSYLVANIA, et al.,
Petitioners

v.

MERRY J. MURTAGH, et al.,
Respondents

BRIEF OF AMICI CURIAE COMMONWEALTH OF PENNSYLVANIA, ARIZONA, MICHIGAN, NEW HAMPSHIRE, RHODE ISLAND, SOUTH CAROLINA AND TENNEESEE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTERESTS OF AMICUS CURIAE..... 1

ARGUMENT..... 4

I. The Decision in this Case Conflicts with the Decisions of Other State Courts of Last Resort..... 4

II. The Supreme Court of Pennsylvania has Decided an Important Federal Question that Should be Resolved by this Court..... 9

III. The Supreme Court of Pennsylvania has Decided a Federal Question in a Way That Conflicts with Applicable Decisions of this Court..... 18

CONCLUSION..... 24

TABLE OF AUTHORITIES

CASES **PAGE**

Bloomingdale's By Mail, Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), cert. denied, 113 S. Ct. 3002 (1993), reh'g. denied, 114 S. Ct. 15 (1993) 10

Boise Artesian Water Co. v. Boise City, 213 U.S. 276 (1909)..... 13

Burrell v. Mississippi State Tax Commission, 536 So. 2d 848 (Miss. 1988), reversing State Tax Commission v. Fondren, 387 So. 2d 712 (Miss. 1980), cert. denied, 450 U.S. 1040 (1981) 7

Dows v. Chicago, 11 Wall. 108 (1871)... 12

Fair Assessment in Real Estate Association v. McNary , 454 U.S. 100 (1981)..... 14, 15, 17, 18, 19

Felder v. Casey, 487 U.S. 131 (1988)..... 20, 22

Harper v. Virginia Department of Taxation, 509 U.S., 125 L. Ed. 2d 74 16

Hogan v. Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), cert. denied, 112 S. Ct. 867 (1992) 7

Howlett v. Rose, 496 U.S. 356 (1990) 20, 24

Maine v. Thiboutot, 448 U.S. 1 (1980) 20

Matthews v. Rogers, 284 U.S. 521 (1932) 12

McKesson v. Division of Alcoholic Beverages, 496 U.S. 18 (1990) 15

Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1991), cert. denied, 112 S. Ct. 867 (1992) 7

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982)..... 20, 21, 22, 23

Perez v. Ledesma, 401 U.S. 82, 128 n. 17 (1971)..... 15

Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992)..... 8

Singer Sewing Machine Co. v. Benedict, 229 U.S. 481 (1913)..... 13

Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (1984), aff'd by an equally divided court, 471 U.S. 82 (1985)(Powell, J., not participating) 7

State v. Quill Corp., 500 N.W.2d 196 (N.D.), cert. denied, 114 S. Ct. 173 (1993) 7, 9

STATUTES

42 U.S.C. §1983 (§1983) 4

42 U.S.C. §1988 (§1988)..... 8, 18

81 Cong. Rec. 1416 (1937)..... 13

Tax Injunction Act, 28 U.S.C. §1341 12

INTERESTS OF AMICUS CURIAE

The interest of the amici states in this case is the overriding necessity to maintain the fiscal integrity of the state and local governments and the efficient, expeditious, and non-disruptive resolution of state and local tax disputes. This Court has long recognized two unassailable and well established principles; first, that states and localities rely chiefly on their respective tax systems to obtain the means to carry on the business of government and that it is of paramount importance that courts exercise restraint in disturbing tax enforcement schemes, even when entertaining constitutional challenges; second, that constitutional challenges to the application and assessment of state and local taxes are

best resolved in the first instance by the fair, complete and adequate remedies provided by the state to resolve complex tax questions.

The decision of the Supreme Court of Pennsylvania in this case, allowing taxpayers bringing actions pursuant to 42 U.S.C. §1983 (§1983) to circumvent fair and complete state statutory remedies, flies in the face of these well settled principles. Left undisturbed, it could lead to the disruption of state and local revenue collection systems by allowing taxpayers through injunctive, damage and attorney fee actions, to either enjoin the collection of taxes or restrain tax officials from carrying out their enforcement responsibilities. It will further enable Pennsylvania taxpayers to ignore time honored statutory tax review

procedures, enacted to adjudicate complex state tax issues, by merely articulating in their state court complaint a constitutional challenge to the state tax system. It will have the concomitant result of depriving the state or local tax agency of an opportunity to rectify alleged improprieties in the enforcement of the tax law, and will open a floodgate of litigation by encouraging taxpayers to bring federal damage actions, <u>including attorney fee claims,</u> against state and local officials that are not otherwise available in federal court or to other similarly situated taxpayers in other states. The legal and fiscal interests of Pennsylvania and other amicus states in this matter cannot be overstated.

ARGUMENT

I. The Decision in this Case Conflicts with Decisions of Other State Courts of Last Resort.

The Petition for a Writ of Certiorari (Petition) at pp. 15-22 provides this Court with an extensive analysis as to how other state courts of last resort have resolved the question of whether taxpayers must first exhaust their plain, adequate and complete state statutory remedies prior to filing §1983 action in state court. No less than ten state courts of last resort (as well as two intermediate appellate courts) have concluded that they will not entertain such actions where taxpayers have failed to exhaust the prescribed state statutory remedies. This Court, in an equally divided opinion, affirmed the decision of one of these courts and, in three of the

cases, denied the taxpayers' petition for a writ of certiorari.[1] Conversely, three state courts of last resort have concluded, as did the Supreme Court of Pennsylvania herein, that a failure to exhaust the plain and adequate state statutory remedies does not deprive the state court of jurisdiction to entertain a §1983 action challenging a state's enforcement of its tax laws.[2]

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[1] Spencer v. South Carolina Tax Comm'n, 281 S.C. 492, 316 S.E.2d 386 (1984), aff'd by an equally divided court, 471 U.S. 82 (1985)(per curiam)(Powell, J., not participating); Hogan v. Musolf, 163 Wis.2d 1, 471 N.W.2d 216 (1991), cert. denied, 112 S. Ct. 867 (1992); Nutbrown v. Munn, 311 Or. 328, 811 P.2d 131 (1991), cert. denied, 112 S.Ct. 867 (1992); State v. Quill Corp., 500 N.W. 2d 196 (N.D.), cert. denied, 114 S.Ct. 173 (1993).

[2] In one of these cases, the state court reversed one of its prior decisions that had followed the majority exhaustion rule and in which this Court had denied the taxpayer's petition for certiorari. See Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848, 862-846 (Miss.

Recently, this conflict became even more apparent in the context of taxpayers' claims for attorney's fees pursuant to 42 U.S.C. §1988 (§1988), an issue that cannot be resolved without first addressing the question of whether a taxpayer may bring a §1983 suit without first exhausting the state's fair and adequate statutory remedies. On remand from this Court's decision in Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992) (wherein this Court upheld Quill's Commerce Clause claim against the state), the Supreme Court of North Dakota rejected Quill's request for §1988 attorneys' fees. The court concluded that since Quill could not have maintained a §1983 action in state court

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1988), reversing State Tax Comm'n v. Fondren, 387 So. 2d 712 (Miss. 1980), cert. denied, 450 U.S. 1040 (1981).

because of the existence of a plain, adequate and complete state statutory remedy, it had no choice but to reject Quill's demand for §1988 fees. This Court denied Quill's petition for certiorari. State v. Quill Corp, 500 N.W. 2d 196, 200-203 (N.D.), cert. denied, 114 S.Ct. 173 (1993).

Conversely, the Supreme Court of Tennessee awarded §1988 attorney's fees to a similarly situated mail order company that had also prevailed on its Commerce Clause action against the state. The court, citing much of the same precedent relied on by the Supreme Court of Pennsylvania in the instant case, concluded that a state may not frustrate the intent of §1988 by setting up state law exhaustion barriers to deprive prevailing parties under §1983 their

federal right to attorney fees. This Court denied both Tennessee's petition for certiorari and motion for rehearing. Bloomingdale's By Mail, Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992), cert. denied, 113 S.Ct. 3002 (1993), reh'g. denied, 114 S.Ct. 15 (1993).

The existence of this direct conflict between state courts of last resort on the issue of §1988 attorney's fees further exacerbates the already existing conflict as it pertains to the underlying question of whether a state court may dismiss a §1983 challenge to a state or local taxation system where there exists a plain, adequate and complete statutory remedy. The point is simple -- left unresolved by this Court, the question of whether a taxpayer's federally based claim in state court must

be resolved in the first instance by the appropriate state tax review procedure, will continue to lead to differing outcomes depending on the particular state in which the action is brought, resulting in the non-uniform application of federal law. The amici states respectfully request that this Court resolve this conflict by granting the Petition.

II. The Supreme Court of Pennsylvania has Decided an Important Federal Question that Should be Resolved by this Court.

This Court has long recognized the significant and sensitive nature of state tax systems and the need for judicial restraint when deciding cases that affect such systems. Prior to the enactment of §1983, Justice Field wrote:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Dows v. Chicago, 11 Wall. 108, 110 (1871).

Recognizing this overriding principle, prior to the enactment of the Tax Injunction Act, 28 U.S.C. §1341, this Court reaffirmed the need to restrain the exercise of judicial equitable power in state tax cases by striking down federal lawsuits seeking to enjoin the collection of state taxes where state statutory remedies had not been exhausted. Matthews v. Rogers, 284 U.S. 521 (1932);

Singer Sewing Machine Co. v. Benedict, 229 U.S. 481 (1913); Boise Artesian Water Co. v. Boise City, 213 U.S. 276 (1909).

Congress similarly recognized this imperative. By enacting the Tax Injunction Act, Congress intended to end

> [t]he existing practice of the Federal courts to entertain tax-injunction suits mak[ing] it possible for foreign corporations to withhold from a state and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt state and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay.

81 Cong. Rec. 1416 (1937).

This court again affirmed these underlying principles when it chose in 1981 to extend the coverage of the Tax Injunction Act to bar §1983 damage

actions in federal court, where available state remedies had not been exhausted. Fair Assessment in Real Estate Assn. v. McNary , 454 U.S. 100 (1981). In recognizing that the threat of large damage actions, including suits for §1988 attorney fees, can just as easily inhibit state tax officials from carrying out their enforcement responsibilities as a court ordered injunction, this Court again emphasized the need for judicial non-interference with a state's effort to enforce its state tax laws.

> The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayer's disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are

> organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the state of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

454 U.S. at 182, n. 6, quoting Perez v. Ledesma, 401 U.S. 82, 128, n.17 (1971) (Justice Brennan concurring in part and dissenting in part).[3]

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[3] This Court has previously shown great deference to state statutory remedies. See e.g. McKesson v. Division of Alcoholic Beverages 496 U.S. 18, 37 (1990) ("[a]llowing taxpayers to litigate their tax liabilities prior to payment

The overriding principles and justification in favor of preventing federal courts from interfering with state tax statutory schemes is no less applicable, nor less compelling, when such suits are brought in state court. A §1983 action brought in state court is no less a burden upon the state remedial scheme than a §1983 action brought in federal court. The Supreme Court of Pennsylvania's decision herein, allowing taxpayers to proceed in state court with a §1983 claim prior to exhausting state

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might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult.") The circumvention of state remedial schemes permitted by the Pennsylvania Supreme Court in this instance conflicts with such cases. See also, Harper v. Virginia Department of Taxation, 509 U.S. , 125 L.Ed.2d 74, 113 S.Ct. 2511 (1993).

administrative tax remedies, will no less deprive local tax officials the opportunity to rectify alleged improprieties than if a federal district court reaches the same conclusion. It is no less disruptive of the state's internal economy and statutory tax procedures for a state court to act pursuant to §1983 and suspend the usual tax collection and refund procedures of the state, than it would be for a federal district court to do so. Moreover, irrespective of whether a federal court or a state court awards damages or attorney's fees to a taxpayer pursuant to the filing of a §1983 or §1988 action against state officials in their personal capacity, the result is still the same. As this Court observed in the Fair Assessment case,

> [t]here is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorneys fees under 42 U.S.C. §1988, would promptly cease the conduct found to have infringed petitioners' constitutional rights, whether or not those officials were acting in good faith. In short, petitioner's actions would in every practical sense operate to suspend collection of state taxes.

454 U.S. at 185.

Finally, the federal policy in favor of allowing states, even in the face of a §1983 challenge to its state tax system, to utilize its state remedial procedures to address complex tax questions (and perhaps avoid having to address the federal constitutional issue at all) is just as readily skirted when a state court, as opposed to a federal court, allows taxpayers to circumvent prescribed statutory remedies.

Simply put, many of the fears expressed by this Court and Congress with respect to a federal court infringing on a state tax system are present when that same federal cause of action is brought in state court. This Court simply cannot permit taxpayers, with the assistance of the state courts, to circumvent these compelling significant federal interests by merely taking the identical §1983 and §1988 complaint that would be unwelcome in federal court, and walking it down the block to the state courthouse.[4]

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[4] Any contention that the Fair Assessment decision and/or the Congressional intent underlying the Tax Injunction Act were based exclusively on concerns for federalism and comity principles, and are therefore inapplicable to state court §1983 actions, is belied by a thorough reading of both the Fair Assessment case and the legislative history of the act. In any event, as set forth in greater detail in our next section, the doctrine of comity would equally restrict a state court from interpreting a federal cause of action in

III. The Supreme Court of Pennsylvania has Decided a Federal Question in a Way that Conflicts with Applicable Decisions of this Court.

The Supreme Court of Pennsylvania in this case relied principally on three decisions of this Court to support its conclusion that state courts could not require taxpayers to avail themselves of fair and adequate statutory remedial procedures prior to lodging a §1983 action in state court: Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982); Howlett v. Rose, 496 U.S. 356 (1990); and Felder v. Casey, 487 U.S. 131 (1988). In each of these cases, this Court struck

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a manner contrary to federal law principles. Finally, it bears emphasis that the issuance of the majority of this Court's decisions interpreting the Tax Injunction Act, as well as the enactment of the TIA itself, came at a time prior to this Court's holding in Maine v. Thiboutot, 448 U.S. 1 (1980), wherein this Court held that state courts had concurrent jurisdiction with federal courts to entertain §1983 claims.

down a state/municipality's attempt to impose state exhaustion requirements on plaintiffs seeking to assert a federal constitutional right pursuant to §1983.[5] Thus, in Felder, this Court held that

> [i]n enacting §1983, Congress entitled those deprived of their civil rights to recover full compensation from the government officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and

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[5] In Patsy, the defendant state university asserted that plaintiff had to exhaust the state university system's internal grievance procedure prior to bringing a §1983 case alleging race and sex discrimination. In Felder, this Court rejected a defendant municipality's argument that a plaintiff alleging a §1983 violation (arising out of a beating and arrest by local police officials) had to comply with the state's notice of claim limitation statute. In Howett, a Florida court refused to entertain a §1983 action brought by a former student against a county school board, based on state sovereign immunity grounds.

> that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal Civil Rights Law. Principles of federalism, as well as the supremacy clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court.

487 U.S. at 153.

Moreover, after concluding generally in Patsy that exhaustion of an internal grievance procedure was not required as a precondition to bringing a §1983 action, this Court observed that congressional intent controls whether exhaustion is required.

> Legislative purpose is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play

> an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and the court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.

457 U.S. at 501-502.

Read together, these cases stand for the simple proposition that any state procedural rule that has the effect of "minimizing government liability" -- and that is inconsistent with the federal remedy as intended by Congress -- cannot stand. Contrary to the Supreme Court of Pennsylvania's holding in the instant case, these cases do not purport to nullify all statutory procedural rules that might serve as an obstacle to vindicating a federal right, but only

those state rules that purport to limit the federal remedy in a way that it would not be limited if the same §1983 action was pursued in federal court.

Howlett and Felder make it clear that when state courts entertain federal causes of action "the elements of, and the defenses to, a federal cause of action are defined by federal law," so that the outcome of such actions will be the same, regardless if decided in a state or federal forum. Howlett 496 U.S. at 375 (emphasis supplied); Felder 479 U.S. at 2307 (striking down the state notice of claim law because it conflicted with federal law and "because its enforcement . . . will frequently and predictably produce different outcomes in §1983 litigation based solely on whether the claim is asserted in state or federal

court"). The holding of the Supreme Court of Pennsylvania in the instant matter is directly at odds with these principles -- it constitutes an interpretation and application of federal law by a state court, not "as it finds it," but in a manner inconsistent with how this Court and Congress have defined the appropriate remedy in §1983 state tax challenges. Moreover, it guarantees that litigants will receive differing outcomes depending on whether the §1983 action is brought in state or federal court. This adverse result, in conjunction with the inconsistent outcomes among state courts, screams out for this Court's intervention to ensure a uniform treatment of §1983 causes of action, irrespective of the forum in which they are raised.

CONCLUSION

For the foregoing reasons, amici urge this Court to grant the Petition for Writ of Certiorari.

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COUNTY OF BERKS, PENNSYLVANIA, *et al.*,
Petitioners,

v.

MERRY J. MURTAGH, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania, Middle District

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

The Judgment Of The Supreme Court Of Pennsylvania Is "Final" Within The Meaning Of 28 U.S.C. § 1257 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: Page

Behe v. Chester County Bd. of Assessment Appeals, 952 F.2d 66 (3d Cir. 1991) 9

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 4, 9

Dows v. City of Chicago, 78 U.S. (11 Wall.) 108 (1871) 6

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 3, 7

Flynt v. Ohio, 451 U.S. 619 (1981) (per curiam) .. 6

Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) ... 3

Garrett v. Bamford, 582 F.2d 810 (3d Cir. 1978) .. 9

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 7

Greenwich Township v. Murtagh, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) 2, 9

Hogan v. Musolf, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), *cert. denied*, 112 S. Ct. 867 (1992) 8

Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964) 5, 6

Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 4-6, 9

Mitchell v. Forsyth, 472 U.S. 511 (1985) 6

Murtagh v. County of Berks, 634 A.2d 179 (Pa. 1993) 2, 9

Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981) 7

Sunderland Properties, Inc. v. County of Berks, 750 F. Supp. 704 (E.D. Pa. 1990) 3, 9

Tully v. Griffin, Inc., 429 U.S. 68 (1976) 7

TABLE OF AUTHORITIES – *(Continued)*

United States Constitution: Page

U.S. CONST. art. VI, cl. 2 ..... 2, 8

Statutes:

28 U.S.C. § 1257 ..... *passim*

42 U.S.C. § 1983 ..... *passim*

INTRODUCTION

In their Brief in Opposition, respondents maintain that the Court lacks jurisdiction to entertain the Petition for a Writ of Certiorari filed in this matter because the Supreme Court of Pennsylvania's judgment entered November 10, 1993 is said not to constitute a final judgment under 28 U.S.C. § 1257(a).

Petitioners submit this Reply to demonstrate that the Court's decisions construing 28 U.S.C. § 1257 establish that the Supreme Court of Pennsylvania's judgment entered November 10, 1993 does indeed qualify as a final judgment.

Accordingly, because the Brief in Opposition fails to undermine the assertion of petitioners and *amici* that the question presented is *both* a question of federal law as to which state courts of last resort are in direct conflict *and* an important question of federal law that has not been, but should be, resolved by the Court, petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

ARGUMENT

The Judgment Of The Supreme Court Of Pennsylvania Is "Final" Within The Meaning Of 28 U.S.C. § 1257

Respondents contend that the judgment sought to be reviewed does not constitute a final judgment for purposes of 28 U.S.C. § 1257(a). To understand why respondents are mistaken, it is necessary to revisit the procedural history of this case.

As is explained in more detail in the Statement of the Case, *see* Petition at 6-9, the Commonwealth Court of Pennsylvania, Pennsylvania's intermediate appellate court, dismissed respondents' 42 U.S.C. § 1983 suit challenging the constitutionality of the system of real estate taxation in Berks County, Pennsylvania because respondents had failed to pursue the plain, adequate and complete administrative and judicial remedies available

to them under state law. *See Greenwich Township v. Murtagh,* 144 Pa. Commw. 624, 636-37, 601 A.2d 1352, 1358-59 (1992) (reprinted in Appendix (App.) at 31a).

In so ruling, the Commonwealth Court rejected respondents' assertion that the Supremacy Clause of the United States Constitution, U.S. CONST. Art. VI, cl. 2, requires state courts to entertain real estate tax assessment challenges brought under 42 U.S.C. § 1983 regardless of whether plain, adequate and complete state remedies have been pursued. *See Greenwich Township,* 144 Pa. Commw. at 632, 601 A.2d at 1356 (reprinted in App. at 26a-27a).

On appeal, the Supreme Court of Pennsylvania reversed. Pennsylvania's highest court ruled that the Supremacy Clause *requires* state courts to entertain tax challenges brought pursuant to 42 U.S.C. § 1983 even where plaintiffs have not exhausted the plain, adequate and complete remedies available to them under state law. *See Murtagh v. County of Berks,* 634 A.2d 179, 185 (Pa. 1993) (reprinted in App. at 12a-13a). The Supreme Court of Pennsylvania's ruling on the question presented is the final word that will be spoken by the Pennsylvania courts in this suit concerning whether the Supremacy Clause requires state courts to hear 42 U.S.C. § 1983 tax challenges regardless of whether plaintiffs have pursued the plain, adequate and complete remedies available to them under state law.

The government entities who have joined as petitioners herein believe that the vital policy of federal noninterference in matters of state and local taxation dictates that they should not be subject to respondents' state court 42 U.S.C. § 1983 tax challenge because respondents have failed to pursue the plain, adequate and complete administrative and judicial remedies available to them under Pennsylvania law. This strong federal policy of noninterference in matters of state and local taxation is demonstrated by the fact that if respondents' suit had been filed in federal court, the suit would have been dismissed in favor of the plain, adequate and

complete remedies existing under state law. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100, 116 (1981); *Sunderland Properties, Inc. v. County of Berks,* 750 F. Supp. 704 (E.D. Pa. 1990) (dismissing identical challenge to Berks County's system of property taxation in favor of the plain, adequate and complete administrative and judicial remedies existing under Pennsylvania law).

In *McNary,* the Court held that Congress did not intend to subject state and local governments to 42 U.S.C. § 1983 tax challenges brought in *federal* courts where the plaintiffs have access to plain, adequate and complete remedies under state law. *See McNary,* 454 U.S. at 116. Petitioners ask this Court to recognize that Congress likewise did not intend to subject state and local governments to 42 U.S.C. § 1983 tax challenges brought in *state* courts where the plaintiffs have access to plain, adequate and complete remedies under state law.

If respondents' jurisdictional argument were correct, petitioners would not be able to secure review of the important question presented until after respondents' 42 U.S.C. § 1983 tax challenge was resolved on its merits. In that event, petitioners' eventual victory, establishing, after this suit is litigated to a judgment on its merits, that petitioners *should not have been* subject to this state court tax challenge arising under 42 U.S.C. § 1983, would be a hollow victory indeed.

Fortunately, the final judgment requirement contained in 28 U.S.C. § 1257 does not compel such a harsh result. A review of the Court's decisions construing 28 U.S.C. § 1257 establishes that the Court has repeatedly refused to adopt the rigid view of finality that respondents espouse in their Brief in Opposition.

As far back as *Forgay v. Conrad,* 47 U.S. (6 How.) 201, 203 (1848), the Court noted that "this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more

liberal, and, as we think, more reasonable construction, and one more consonant to the intention of the legislature."

More recently, in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 486 (1975), the Court examined the "pragmatic approach that we have followed in the past in determining finality." In *Cox,* the Court described the relevant category of cases, identified by the Court as the fourth category, in which the final judgment requirement has been pragmatically applied:

> there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83.

The Court in *Cox* viewed its earlier decision in *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555 (1963), as falling into this category of cases considered final for purposes of 28 U.S.C. § 1257. In *Langdeau,* the question presented was whether federal law prohibited two national banks from being sued in a state court located in Travis County, Texas and instead required that the banks be sued in a state court located in Dallas County, Texas. *See id.* at 556-57. In holding that a final judgment existed under 28 U.S.C. § 1257 even though

the Supreme Court of Texas had only adjudicated the question of proper venue, this Court explained:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may be all for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. Accordingly, we note our jurisdiction to hear these appeals under § 1257(2) and turn now to the question of whether appellants may be sued in Travis County court.

Langdeau, 371 U.S. at 558.

Similarly, in *Hudson Distribs., Inc. v. Eli Lilly & Co.,* 377 U.S. 386, 389 n.4 (1964) (emphasis added), the Court held, citing *Langdeau*:

> The fact that separate and unresolved issues are pending in the Ohio courts and subject to "further proceedings" therein on the cross-petition *does not* render the judgment of the Ohio Supreme Court on the issue here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. § 1257.

In so ruling, the Court specifically rejected a dissent that advanced the argument now made by respondents:

> One would have thought that the judgments reviewed here were paradigms of the nonfinal judgment. Assuming that the federal question which the Court decides was really passed on by the Ohio Supreme Court, it is clear nonetheless that this litigation is still in its early stages. No rights have yet been established; no liabilities have been incurred.

> The Court acknowledges that federal questions, involving unresolved issues of fact and interpretations of the Ohio Act, must still be decided by the Ohio courts.

Hudson Distribs., 377 U.S. at 398-99 (Harlan, J., dissenting) (footnote omitted).

Further supporting this Court's exercise of jurisdiction over the judgment of the Supreme Court of Pennsylvania is *Mitchell v. Forsyth*, 472 U.S. 511, 525 n.8 (1985), where the Court wrote, citing *Langdeau*: "[s]imilarly, we have held that state-court decisions rejecting a party's federal law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257."

Here, petitioners' argument that they should not be subject to respondents' 42 U.S.C. § 1983 tax challenge in state court plainly is a contention that petitioners are "not subject to suit before a particular tribunal." *Mitchell v. Forsyth*, 472 U.S. at 525 n.8.

Respondents' reliance on the Court's *per curiam* opinion in *Flynt v. Ohio*, 451 U.S. 619 (1981), is misplaced. There, the Court explained that "[t]he cases which the *Cox* opinion listed as falling in the fourth category involved identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in state courts." *Id.* at 622. In *Flynt*, the Court held that no federal policy would be "seriously erode[d]" by delaying review until the state court proceedings had run their course. *Id.*

Here, by contrast, permitting respondents' 42 U.S.C. § 1983 tax challenge to go forward on the merits would seriously erode the important and longstanding federal policy of avoiding federal intrusion into matters of state and local taxation.

This important policy was recognized in *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871), where the Court wrote:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Similarly, in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 298 (1943), the Court wrote:

> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially when the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax.

See also Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976) (emphasis added) ("As the Court has frequently had occasion to note, [28 U.S.C. § 1341] has its roots in equity practice, in principles of federalism, and *in recognition of the imperative need of a State to administer its own fiscal operations.*").

In *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 527 (1981), the Court stated that "the reasons supporting federal noninterference [with state taxation] are just as compelling today as they were in 1937." The Court also noted that "[t]he property tax is by far the most important source of tax revenue for cities and counties." *Id.*

Finally, in *McNary,* 454 U.S. at 116, the Court held that the federal policy of noninterference in matters of state and local taxation was *so important* as to overcome

the competing important federal policy favoring ready access to federal courts for 42 U.S.C. § 1983 actions.

As the Supreme Court of Wisconsin explained in *Hogan v. Musolf,* 163 Wis. 2d 1, 18, 471 N.W.2d 216, 222 (1991), *cert. denied,* 112 S. Ct. 867 (1992):

> The Supreme Court's primary interest in *McNary* was to avoid interference with state taxing practices by permitting states to have the opportunity to apply their remedies and procedures in tax matters before federal remedies are sought by a sec. 1983 action. We understand *McNary* as indicating that the Court is equally concerned that tax challenges be conducted according to state remedies as it is that they be conducted in a state forum. It would be no less disruptive of the state's internal economy and administrative tax procedures for a state court to act under sec. 1983 and suspend the usual tax collection and refund procedures of the state than it would be for a federal court to do so. In addition, regardless of which court interferes with the state's fiscal operations, tax officials would be improperly denied the opportunity to rectify any alleged impropriety before being subject to a sec. 1983 action. Accordingly, we conclude that the policies which motivated the Court's decision in *McNary* are equally applicable to sec. 1983 actions in state court.

Here, the only reason petitioners will be subject to respondents' state court 42 U.S.C. § 1983 tax challenge is because the Supreme Court of Pennsylvania has held that result to be compelled by the Supremacy Clause of the United States Constitution. If that holding is erroneous, as petitioners believe, it should be corrected now, before infliction of the disruptive harm that the important federal policy of noninterference in matters of state and local taxation is meant to prevent.

In sum, the judgment that the Supreme Court of Pennsylvania entered in this matter on November 10, 1993 constitutes a final judgment for purposes of 28

U.S.C. § 1257(a) because the judgment falls within the fourth category of final judgments described in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. at 482-85.

Specifically, this case is in all relevant respects indistinguishable from *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. at 556-58, where the Court ruled that a judgment rejecting the assertion that federal law required a claim to be heard in one forum instead of another constituted a final judgment for purposes of 28 U.S.C. § 1257.

It cannot be disputed that the right sought to be vindicated in the Petition is important and would be seriously eroded if relief were to be withheld and respondents' 42 U.S.C. § 1983 action were permitted to proceed forward to a judgment on its merits. It is also beyond dispute that a decision reversing the judgment of the Supreme Court of Pennsylvania would bring this suit to an end.[1]

For these reasons, the judgment of the Supreme Court of Pennsylvania in this matter constitutes a final judgment for purposes of 28 U.S.C. § 1257(a).

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1. While the Supreme Court of Pennsylvania did not reach the question of whether Pennsylvania's current statutory remedies for addressing challenges to property tax assessment practices are plain, adequate and complete, *see Murtagh,* 634 A.2d at 182 n.11 (reprinted in App. at 7a), every other court to address the merits of this issue has answered that question in the affirmative. *See Behe v. Chester County Bd. of Assessment Appeals,* 952 F.2d 66, 68 (3d Cir. 1991); *Garrett v. Bamford,* 582 F.2d 810, 815, 817 (3d Cir. 1978); *Sunderland Properties,* 750 F.Supp. at 710, *Greenwich Township,* 144 Pa. Commw. at 636-37, 601 A.2d at 1358-59 (reprinted in App. at 31a).

CONCLUSION

Because respondents are wrong in contending that the judgment of the Supreme Court of Pennsylvania is not "final," and because respondents have failed to assert any other persuasive reason why this Court should not resolve the direct conflict among state courts of last resort regarding the important question of federal law presented, petitioners respectfully pray that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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